

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

IN RE MICROSOFT CORP. ANTITRUST  
LITIGATION

This Document relates to:

*Burst.com, Inc. v. Microsoft Corp.*,  
Civil Action No. JFM-02-cv-2952

MDL Docket No. 1332

Hon J. Frederick Motz

**PUBLIC VERSION**

**EXHIBIT INDEX TO MICROSOFT'S SUR-REPLY IN OPPOSITION TO BURST'S  
MOTION FOR SPOILATION INSTRUCTION, WITNESS PRECLUSION, AND  
RELATED RELIEF**

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March 9, 2005

**EXHIBITS**

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# **EXHIBIT 43**

BILL SCHIEFELBEIN; November 30, 2004

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2                   FOR THE DISTRICT OF MARYLAND  
3

4    IN RE MICROSOFT CORP.                            )  
5    ANTITRUST LITIGATION.                            )  
6    )  
7    this Document relates to:                        )  
8    Burst.com, Inc. Vs.                              )  
9    Microsoft Corp.,                                    )  
10    )  
11    Civil Action No. JPM-02-cv-2952                )  
12

13                   VIDEOTAPED DEPOSITION UPON ORAL EXAMINATION  
14    OF  
15    BILL SCHIEFELBEIN  
16  
17

18                   11:48 A.M.  
19                   NOVEMBER 30, 2004  
20                   925 FOURTH AVENUE, SUITE 2900  
21                   SEATTLE, WASHINGTON  
22  
23  
24  
25    DIANE MILLS, CCR #2399

BILL SCHIEFELBEIN; November 30, 2004

<p style="text-align: right;">Page 98</p> <p>1 know, I brought up Lotus as well saying, you know, I 2 forget what exactly I said, but I brought up Lotus, you 3 know, in one of these contexts.</p> <p>4 Q. When was the last time you spoke with Jeffrey 5 Friedberg?</p> <p>6 A. Pardon me?</p> <p>7 Q. When was the last time you spoke with Jeffrey?</p> <p>8 A. Oh, boy. Jeffrey is in the privacy group now, 9 and I remember probably three months ago or something 10 talking to -- or two months ago talking to him about a 11 privacy issue.</p> <p>12 Q. Ever talk to him about this meeting after the 13 meeting?</p> <p>14 A. About this meeting?</p> <p>15 Q. Yes.</p> <p>16 A. I -- I don't remember this, the meeting 17 itself, so I mean, I don't know if I talked with him in 18 the halls after the meeting, you know, or not. I 19 certainly don't remember, you know, recently talking 20 with him.</p> <p>21 Q. Now, your own e-mails from the period of July 22 2000, after you came back from leave you mass deleted 23 these e-mails, isn't that true?</p> <p>24 A. For July 2001?</p> <p>25 Q. E-mails for July 2000.</p>	<p style="text-align: right;">Page 100</p> <p>1 A. Yeah, when you say "Burst issue," what -- what 2 specific issue?</p> <p>3 Q. Let me be more specific. How was the issue of 4 whether Burst should be permitted to send content in 5 ASF to the 7.0 Player resolved, if you recall?</p> <p>6 MR. TREECE: Object to the form of the 7 question.</p> <p>8 A. So is your -- is your question how was the -- 9 did they sign the license agreement?</p> <p>10 Q. (BY MR. HOSIE) How about this. What 11 happened?</p> <p>12 A. Okay. What happened specifically about the 13 bridge not working?</p> <p>14 Q. Yes.</p> <p>15 A. With Version 7?</p> <p>16 Q. Yes.</p> <p>17 A. From what I recall, after the licensing issue, 18 I made another alternate suggestion to use, you know, 19 asynchronous pluggable protocols which was yet another 20 platform API.</p> <p>21 Q. Known as the URLMON or URLMON solution?</p> <p>22 A. Yeah. URLMON is the broader component, and in 23 particular the interface had to do with asynchronous 24 pluggable protocols.</p> <p>25 Q. And you proposed this URLMON solution after</p>
<p style="text-align: right;">Page 99</p> <p>1 A. E-mails for July 2000.</p> <p>2 Q. When you came back from leave and got a 3 different job, you went back and mass deleted all your 4 old e-mail; true?</p> <p>5 A. When I -- when I left for paternity leave I 6 came back to a different role at Microsoft. I can't 7 remember when exactly I deleted the mails, but with 8 like 100,000 e-mails and multiple gigabytes, I'm bad 9 about that, you know, it was a new role altogether, so 10 I delete it.</p> <p>11 Q. And you would have deleted any e-mails related 12 to Burst in July of 2000 when you mass deleted; 13 correct?</p> <p>14 A. I deleted all my e-mails, I purged all my 15 e-mails whether it was, you know, a letter from my mom 16 or, you know, work or whatever.</p> <p>17 (Deposition Exhibit No. 59 was marked for 18 identification.)</p> <p>19 Q. (BY MR. HOSIE) Let me show you what's been 20 marked as Exhibit 59.</p> <p>21 Now, how was the Burst issue resolved, sir, do 22 you recall?</p> <p>23 MR. TREECE: Object as vague.</p> <p>24 Q. (BY MR. HOSIE) Do you find the question -- I 25 can rephrase it, sir, if you'd like.</p>	<p style="text-align: right;">Page 101</p> <p>1 you realized that the SDK licensing prohibited a direct 2 SDK plugin; correct?</p> <p>3 A. The solution was proposed when -- you know, 4 again, I had concerns that they would be restricted 5 according to the license agreements. You know, I'm 6 not, you know, a lawyer or whatever, but after I 7 realized the concerns with the license agreement, I did 8 propose the URLMON solution.</p> <p>9 Q. Did you tell Burst at some point that contrary 10 to your comments on May 10th, Microsoft would not give 11 them the APIs for a direct SDK plugin?</p> <p>12 A. Did I inform them that they wouldn't be able 13 to use the SDK?</p> <p>14 Q. Yes.</p> <p>15 A. In that way? I can't remember how it was 16 communicated to them; whether I did it or Will Friedman 17 or legal department. I do recall it was communicated 18 to them.</p> <p>19 Q. Now, the URLMON solution, there were technical 20 deficiencies with that solution, were there not, sir?</p> <p>21 A. And again, trying to go through the time frame 22 issue here, it's difficult to recall, you know, what 23 the first suggestions were and so forth. You know, I 24 do recall that, you know, we pointed them to these 25 APIs. They had -- they did have some issues and</p>

26 (Pages 98 to 101)

# **EXHIBIT 44**

**Privilege Log**  
**Burst.com Inc. vs. Microsoft Corp**

Bates Range	Date	Privilege	Subject Matter	Names
PMS-CC-Bu 000501 - 000510	07/25/2002	Attorney-Client Privilege	Email thread containing legal advice with attached draft memo re: Windows Media (WM) 9.	<p>Recipient: Batterberry, Troy - Microsoft</p> <p>Gross, Michael - Shook Hardy &amp; Bacon - Outside Counsel</p> <p>Waresch, John - Microsoft (LCA) - Attorney</p> <p><u>Author:</u> Jones, Jennifer - Microsoft (LCA)</p> <p><u>CC:</u> Andreassen, Noelle - Microsoft (LCA)</p> <p>Jones, Jennifer - Microsoft (LCA)</p> <p><u>Customer:</u> Batterberry, Troy - Microsoft</p> <p><u>Author of Attachment:</u> Gross, Michael - Shook Hardy &amp; Bacon - Outside Counsel</p>
PMS-CC-Bu 000516 - 000517	08/06/2002	Attorney-Client Privilege	Email thread communicating information requested by Legal and soliciting information sufficient to provide legal advice re: Media Foundation patents.	<p>Recipient: Debique, Kurt - Microsoft</p> <p>Schmidt, Kymere - Microsoft (LCA)</p> <p><u>Author:</u> Critts, Brian - Microsoft</p> <p><u>CC:</u> Batterberry, Troy - Microsoft</p> <p>Eppenauer, Bart - Microsoft (LCA) - Attorney</p> <p>Stewart, Jim - Microsoft</p> <p><u>Customer:</u> Batterberry, Troy - Microsoft</p>
PMS-CC-Bu 000518 - 000541	08/09/2002	Attorney-Client Privilege	Email thread marked Attorney-Client Privileged requesting and containing legal advice re: Corona/DX licensing.	<p>Recipient: Averett, Linda - Microsoft</p> <p>Batterberry, Troy - Microsoft</p> <p>Beckerman, Mike - Microsoft</p> <p>Bverageon, Preston - Microsoft</p> <p>Critts, Brian - Microsoft</p> <p>Flanagan, Dennis - Microsoft</p> <p>Friedberg, Jeffrey - Microsoft</p> <p>Glucock, Sue - Microsoft (LCA) - Attorney</p> <p>Kennan, Brian - Microsoft (LCA) - Attorney</p> <p>Pennington, Stan - Microsoft</p> <p>Schneidbein, Bill - Microsoft</p> <p>Vicens-Harris, Nick - Microsoft</p> <p><u>Author:</u> Knowlton, Chadd - Microsoft</p> <p><u>Customer:</u> Batterberry, Troy - Microsoft</p>

**Privilege Log**  
**Burst.com Inc. vs. Microsoft Corp**

Bates Range	Date	Privilege	Subject Matter	Name
PMS-CC-Bu 003380 - 003381	01/30/2001	Attorney-Client Privilege	Email thread marked Attorney-Client Privileged requesting legal advice re: Burst patents.	<p>Recipient: Bewatt, Tony - Microsoft            Beckerman, Mike - Microsoft            O'Rourke, Bret - Microsoft            Poole, Will - Microsoft            Wersch, John - Microsoft (LCA) - Attorney</p> <p>Author: Schiefelebin, Bill - Microsoft</p> <p>CC: Poole, Will - Microsoft            Buecheler, Kurt - Microsoft</p> <p>Custodian: Wersch, John - Microsoft (LCA) - Attorney</p>
PMS-CC-Bu 003382 - 003383	01/31/2001	Attorney-Client Privilege	Email thread marked Attorney-Client Privileged requesting and containing legal advice re: Burst patents.	<p>Recipient: Bewatt, Tony - Microsoft            Beckerman, Mike - Microsoft            O'Rourke, Bret - Microsoft            Poole, Will - Microsoft            Schiefelebin, Bill - Microsoft            Wersch, John - Microsoft (LCA) - Attorney</p> <p>Author: Buecheler, Kurt - Microsoft</p> <p>Custodian: Wersch, John - Microsoft (LCA) - Attorney</p>
PMS-CC-Bu 003384 - 003387	02/01/2002	Attorney-Client Privilege	Email containing legal advice re: attached Burst Patent table.	<p>Recipient: Schmid, Kymeric - Microsoft (LCA)            Wersch, John - Microsoft (LCA) - Attorney</p> <p>Author: Jones, Jennifer - Microsoft (LCA)</p> <p>Custodian: Wersch, John - Microsoft (LCA) - Attorney</p> <p>Author of Attachment: Jones, Jennifer - Microsoft (LCA)</p>
PMS-CC-Bu 003388 - 003397	07/25/2002	Attorney-Client Privilege	Email thread containing legal advice with attached draft report re: W.M.	<p>Recipient: Butterby, Troy - Microsoft            Gross, Michael - Shook Hardy &amp; Bacon - Outside Counsel            Wersch, John - Microsoft (LCA) - Attorney</p> <p>Author: Jones, Jennifer - Microsoft (LCA)</p> <p>CC: Andrazen, Noelle - Microsoft (LCA)            Jones, Jennifer - Microsoft (LCA)</p> <p>Custodian: Wersch, John - Microsoft (LCA) - Attorney</p> <p>Author of Attachment: Jones, Jennifer - Microsoft (LCA)</p>

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**Burst.com Inc. vs. Microsoft Corp**

Bates Range	Date	Privilege	Subject Matter	Names
PMS-CC-Bu 003398 - 003407	07/26/2002	Attorney-Client Privilege/Work Product	Email thread with attached draft memo, both containing legal advice prepared in anticipation of Burst litigation re: draft opinion.	Recipient Culbert, Andy - Microsoft (LCA) - Attorney Author Werch, John - Microsoft (LCA) - Attorney Custodian Werch, John - Microsoft (LCA) - Attorney Author of Attachment Shock Hardy & Bacon - Outside Counsel
PMS-CC-Bu 003408 - 003408	08/06/2002	Attorney-Client Privilege	Email thread containing legal advice re: WM.	Recipient Batterberry, Troy - Microsoft Groen, Michael - Shock Hardy & Bacon - Outside Counsel Werch, John - Microsoft (LCA) - Attorney Author Jones, Jennifer - Microsoft (LCA) Copies Andreasen, Noelle - Microsoft (LCA) Custodian Werch, John - Microsoft (LCA) - Attorney
PMS-CC-Bu 003409 - 003409	06/07/2001	Attorney-Client Privilege/Work Product	Memo marked Attorney-Client Privileged/ Work Product prepared in anticipation of litigation containing legal advice re: Burst patents/infringement assessment.	Author Werch, John - Microsoft (LCA) - Attorney Custodian Werch, John - Microsoft (LCA) - Attorney
PMS-CC-Bu 003410 - 003410	11/20/2001	Attorney-Client Privilege/Work Product	Memo marked Attorney-Client Privileged/ Work Product prepared in anticipation of litigation containing legal advice re: Burst patents/infringement assessment.	Author Werch, John - Microsoft (LCA) - Attorney Custodian Werch, John - Microsoft (LCA) - Attorney
PMS-CC-Bu 003411 - 003412	12/04/2000	Attorney-Client Privilege	Memo containing legal advice re: patent application.	Author Werch, John - Microsoft (LCA) - Attorney Custodian Werch, John - Microsoft (LCA) - Attorney
PMS-CC-Bu 003413 - 003414	12/12/2000	Attorney-Client Privilege/Work Product	Memo marked Attorney Work Product prepared in anticipation of litigation containing legal advice re: Burst patents/infringement assessment.	Author Werch, John - Microsoft (LCA) - Attorney Custodian Werch, John - Microsoft (LCA) - Attorney

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Bates Range	Date	Privilege	Subject Matter	Names
PMS-CC-Bu 003755 - 003757	10/24/2001	Attorney-Client Privilege/Work Product	Email thread marked Attorney-Client Privileged communicating information requested by Legal and containing legal advice re: DOJ settlement negotiations.	<p><u>Recipient</u>            Alshin, Jim - Microsoft            Averett, Linda - Microsoft            Beckerman, Mike - Microsoft            Fadi, Richard - Microsoft            Heiter, David - Microsoft (LCA) - Attorney            Peterson, Joe - Microsoft            Poole, Will - Microsoft            Wallent, Michael - Microsoft  <u>Author</u>            Jones, Chris - Microsoft  <u>Conveyee</u>            Bart, Tom - Microsoft (LCA) - Attorney            D'Arcangelo, Diane - Microsoft (LCA) - Attorney            Holley, Steve - Sullivan &amp; Cromwell - Outside Counsel            Meyers, Chris - Microsoft (LCA) - Attorney            Rule, Rick - Fried Frank Harris - Outside Counsel            Tarzi, Lisa - Microsoft (LCA) - Attorney  <u>Custodian</u>            Beckerman, Mike - Microsoft         </p>
PMS-CC-Bu 003758 - 003754	05/10/2002	Attorney-Client Privilege	Email thread soliciting information sufficient to provide legal advice re: attached draft WM specification.	<p><u>Recipient</u>            Batterberry, Troy - Microsoft  <u>Author</u>            Jones, Jennifer - Microsoft (LCA)  <u>Conveyee</u>            St. Clair, Mariah - Microsoft (LCA)  <u>Custodian</u>            Weresh, John - Microsoft (LCA) - Attorney            Weresh, John - Microsoft (LCA) - Attorney  <u>Name on Email Thread</u>            Shogbamini, Ladi - Shook Hardy &amp; Bacon - Outside Counsel  <u>Author of Attachment</u>            Shogbamini, Ladi - Shook Hardy &amp; Bacon - Outside Counsel         </p>
PMS-CC-Bu 003765 - 003772	05/20/2002	Attorney-Client Privilege	Email thread communicating information requested by Legal and soliciting information sufficient to provide legal advice re: attached draft WM specification.	<p><u>Recipient</u>            Jones, Jennifer - Microsoft (LCA)  <u>Author</u>            Batterberry, Troy - Microsoft  <u>Conveyee</u>            St. Clair, Mariah - Microsoft (LCA)  <u>Custodian</u>            Weresh, John - Microsoft (LCA) - Attorney  <u>Name on Email Thread</u>            Shogbamini, Ladi - Shook Hardy &amp; Bacon - Outside Counsel  <u>Author of Attachment</u>            Batterberry, Troy - Microsoft         </p>

**Privilege Log**  
**Burst.com Inc. vs. Microsoft Corp**

Bates Range	Date	Privilege	Subject Matter	Name
PMS-CC-Bu 003773 - 003774	05/30/2002	Attorney-Client Privilege	Email thread soliciting information sufficient to provide legal advice and requesting legal advice re: WMD specification.	<p>Recipient Gens, Mike - Shock Hardy &amp; Bacon - Outside Counsel Shogbammu, LaDi - Shock Hardy &amp; Bacon - Outside Counsel</p> <p>Author Jones, Jennifer - Microsoft (LCA)</p> <p>CC St. Clair, Mariah - Microsoft (LCA)</p> <p>Wersch, John - Microsoft (LCA) - Attorney</p> <p>Custodian Wersch, John - Microsoft (LCA) - Attorney</p> <p>Name on Email Thread Batterberry, Troy - Microsoft</p>
PMS-CC-Bu 003775 - 003846	06/21/2002	Attorney-Client Privilege/Work Product	Email threads marked Attorney-Client Privileged containing and requesting legal advice with attached documentation compiled in anticipation of litigation re: Burst/patents.	<p>Recipient Culbert, Andy - Microsoft (LCA) - Attorney Wersch, John - Microsoft (LCA) - Attorney</p> <p>Author Eppeneau, Bart - Microsoft (LCA) - Attorney</p> <p>CC Aschbacher, Steve - Microsoft (LCA) - Attorney Batterberry, Troy - Microsoft Beckerman, Mike - Microsoft Choi, Philip A. - Microsoft</p> <p>Custodian Name on Email Thread Wersch, John - Microsoft (LCA) - Attorney</p> <p>Guilich, Mark - Microsoft (LCA) - Attorney Simoneiti, Cheyenne - Microsoft</p> <p>WDMD Competitive Discussion - Microsoft</p> <p>Author of Attachment! Microsoft Legal Morinon, Craig - Microsoft (LCA)</p> <p>Recipient of Attachment Choi, Philip A. - Microsoft</p> <p>Name in Email Thread on Attachment Bradley, Jack - Microsoft (LCA) Cate, Megan - Microsoft (LCA) Malvar, Henrique (Rico) - Microsoft</p>

**Privilege Log**  
**Burst.com Inc. vs. Microsoft Corp**

Bates Range	Date	Privilege	Subject Matter	Names
PMS-CC-Bu 003847 - 003848	06/21/2002	Attorney-Client Privilege/Work Product	Email thread marked Attorney-Client Privileged requesting and containing legal advice in anticipation of litigation re: Burst patent	<p>Recipient</p> <p>Culbert, Andy - Microsoft (LCA) - Attorney</p> <p>Eppenauer, Bart - Microsoft (LCA) - Attorney</p> <p>Warezsh, John - Microsoft (LCA) - Attorney</p> <p>Author</p> <p>Chou, Philip A. - Microsoft</p> <p>Copyee</p> <p>Aeschbacher, Steve - Microsoft (LCA) - Attorney</p> <p>Batterberry, Troy - Microsoft</p> <p>Beckerman, Mike - Microsoft</p> <p>Custodian</p> <p>Warezsh, John - Microsoft (LCA) - Attorney</p> <p>Name on Email Thread</p> <p>Quetlich, Mark - Microsoft (LCA) - Attorney</p> <p>Simonetti, Carylene - Microsoft</p> <p>WDMD Competitive Discussion - Microsoft</p>
PMS-CC-Bu 003849 - 003850	06/21/2002	Attorney-Client Privilege/Work Product	Email thread marked Attorney-Client Privileged requesting and containing legal advice in anticipation of litigation re: Burst patent	<p>Recipient</p> <p>Chou, Philip A. - Microsoft</p> <p>Eppenauer, Bart - Microsoft (LCA) - Attorney</p> <p>Warezsh, John - Microsoft (LCA) - Attorney</p> <p>Author</p> <p>Batterberry, Troy - Microsoft</p> <p>Copyee</p> <p>Aeschbacher, Steve - Microsoft (LCA) - Attorney</p> <p>Beckerman, Mike - Microsoft</p> <p>Custodian</p> <p>Warezsh, John - Microsoft (LCA) - Attorney</p> <p>Name on Email Thread</p> <p>Quetlich, Mark - Microsoft (LCA) - Attorney</p> <p>Simonetti, Carylene - Microsoft</p> <p>WDMD Competitive Discussion - Microsoft</p>
PMS-CC-Bu 003851 - 003851	07/18/2002	Attorney-Client Privilege/Work Product	Email thread requesting and containing legal advice in anticipation of litigation re: Burst patent.	<p>Recipient</p> <p>Gross, Michael - Shook Hardy &amp; Bacon - Outside Counsel</p> <p>Jackson, Patty - Microsoft</p> <p>Jones, Jennifer - Microsoft (LCA)</p> <p>Warezsh, John - Microsoft (LCA) - Attorney</p> <p>Author</p> <p>Pole, Will - Microsoft</p> <p>Copyee</p> <p>St. Clair, Mariah - Microsoft (LCA)</p> <p>Custodian</p> <p>Warezsh, John - Microsoft (LCA) - Attorney</p>

**Privilege Log**  
**Burst.com Inc. vs. Microsoft Corp**

Bates Range	Date	Privilege	Subject Matter	Names
PMS-CC-Bu 003852 - 003852	07/22/2002	Attorney-Client Privilege/Work Product	Email thread containing and requesting legal advice in anticipation of litigation re: Burst patent.	Recipient Jones, Jennifer - Microsoft (LCA) St. Clair, Mariah - Microsoft (LCA) Author Weresh, John - Microsoft (LCA) - Attorney Quotedian Weresh, John - Microsoft (LCA) - Attorney Name on Email Thread Gross, Michael - Shook Hardy & Bacon - Outside Counsel Jackson, Patty - Microsoft Poole, Will - Microsoft
PMS-CC-Bu 003853 - 003853	07/23/2002	Attorney-Client Privilege/Work Product	Email threads containing and requesting legal advice in anticipation of litigation re: Burst patent.	Recipient St. Clair, Mariah - Microsoft (LCA) Weresh, John - Microsoft (LCA) - Attorney Author Jones, Jennifer - Microsoft (LCA) Quotedian Weresh, John - Microsoft (LCA) - Attorney Name on Email Thread Gross, Michael - Shook Hardy & Bacon - Outside Counsel Jackson, Patty - Microsoft Poole, Will - Microsoft Author of Attachment Jackson, Patty - Microsoft Recipient of Attachment Jones, Jennifer - Microsoft (LCA) Name in Email Thread on Attachment Batterberry, Troy - Microsoft Gross, Michael - Shook Hardy & Bacon - Outside Counsel Poole, Will - Microsoft St. Clair, Mariah - Microsoft (LCA) Weresh, John - Microsoft (LCA) - Attorney
PMS-CC-Bu 003856 - 003857	07/23/2002	Attorney-Client Privilege/Work Product	Email thread marked Attorney-Client Privileged requesting and containing legal advice in anticipation of litigation re: Burst patent.	Recipient Jackson, Patty - Microsoft Weresh, John - Microsoft (LCA) - Attorney Author Poole, Will - Microsoft Copies Jones, Jennifer - Microsoft (LCA) St. Clair, Mariah - Microsoft (LCA) Quotedian Weresh, John - Microsoft (LCA) - Attorney Name on Email Thread Gross, Michael - Shook Hardy & Bacon - Outside Counsel Jackson, Patty - Microsoft

**Privilege Log**  
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Bates Range	Date	Privilege	Subject Matter	Names
PMS-CC-Bu 003858 - 003859	07/23/2002	Attorney-Client Privilege/Work Product	Email thread marked Attorney-Client Privileged requesting and containing legal advice in anticipation of litigation re: Burst patent.	<p><u>Recipient</u>            Poole, Will - Microsoft            Werath, John - Microsoft (LCA) - Attorney</p> <p><u>Author</u>            Jackson, Patty - Microsoft</p> <p><u>Copy</u>            Jones, Jennifer - Microsoft (LCA)            St. Clair, Mariah - Microsoft (LCA)</p> <p><u>Custodian</u>            Werath, John - Microsoft (LCA) - Attorney</p> <p><u>Name on Email Thread</u>            Gross, Michael - Shook Hardy &amp; Bacon - Outside Counsel</p>
PMS-CC-Bu 003860 - 003861	07/23/2002	Attorney-Client Privilege/Work Product	Email thread marked Attorney-Client Privileged requesting and containing legal advice in anticipation of litigation re: Burst patent.	<p><u>Recipient</u>            Hoang, Anh - Microsoft (LCA)            Werath, John - Microsoft (LCA) - Attorney</p> <p><u>Author</u>            Jackson, Patty - Microsoft</p> <p><u>Copy</u>            Jones, Jennifer - Microsoft (LCA)            St. Clair, Mariah - Microsoft (LCA)</p> <p><u>Custodian</u>            Werath, John - Microsoft (LCA) - Attorney</p> <p><u>Name on Email Thread</u>            Gross, Michael - Shook Hardy &amp; Bacon - Outside Counsel</p> <p><u>Pool, Will - Microsoft</u></p>
PMS-CC-Bu 003862 - 003888	08/23/1999	Attorney-Client Privilege	Email thread marked Attorney-Client Privileged containing and requesting legal advice with attached draft agreement re: iBeam (with FYI from Chaddha to Bawcutt and Friedman).	<p><u>Recipient</u>            Bawcutt, Tony - Microsoft            Friedman, Will - Microsoft</p> <p><u>Author</u>            Chaddha, Navin - Microsoft</p> <p><u>Custodian</u>            Bawcutt, Tony - Microsoft            Glueck, Sue - Microsoft (LCA) - Attorney            Kennedy, Carolyn - Microsoft (LCA)            Peterson, Marianne Moran - Microsoft (LCA)            Van Arsdale, Cory - Microsoft (LCA) - Attorney</p> <p><u>Name on Email Thread</u>            Williamson, Mary - Preston Gates Ellis - Outside Counsel</p> <p><u>Author of Attachment</u>            Spence, Jeanine - Microsoft</p> <p><u>Williamson, Mary - Preston Gates Ellis - Outside Counsel</u></p>

**Privilege Log**  
**Burst.com Inc. vs. Microsoft Corp**

Bates Range	Date	Privilege	Subject Matter	Names
PMS-CC-Bu-0055550 -0055565	05/02/2002	Attorney-Client Privilege	Email thread marked Attorney-Client Privileged containing information requested by Legal and soliciting information sufficient to provide legal advice re: attached draft WM specification.	Recipient Jones, Jennifer - Microsoft (LCA) Author Batterberry, Troy - Microsoft Copies St. Clair, Mariah - Microsoft (LCA) Weresh, John - Microsoft (LCA) - Attorney Custodian Weresh, John - Microsoft (LCA) - Attorney Author of Attachment Batterberry, Troy - Microsoft
PMS-CC-Bu-0055566 -0055582	05/03/2002	Attorney-Client Privilege	Email thread marked Attorney-Client Privileged soliciting information sufficient to provide legal advice and containing information requested by Legal re: attached draft WM specification.	Recipient Gross, Michael - Shock Hardy & Bacon - Outside Counsel ShokBamunu, Ladi - Shock Hardy & Bacon - Outside Counsel Author Jones, Jennifer - Microsoft (LCA) Copies St. Clair, Mariah - Microsoft (LCA) Weresh, John - Microsoft (LCA) - Attorney Custodian Weresh, John - Microsoft (LCA) - Attorney Author of Attachment Batterberry, Troy - Microsoft
PMS-CC-Bu-0055583 -0055585	05/11/2002	Attorney-Client Privilege	Email thread marked Attorney-Client Privileged requesting and containing legal advice re: WM licensing.	Recipient Bawcutt, Tony - Microsoft Friedman, Will - Microsoft O'Rourke, Brett - Microsoft Scheifelebin, Bill - Microsoft Van Ardale, Cory - Microsoft (LCA) - Attorney Author Beckerman, Mike - Microsoft Copies Glueck, Sue - Microsoft (LCA) - Attorney Custodian Bawcutt, Tony - Microsoft
PMS-CC-Bu-0055586 -005611	05/25/2002	Attorney-Client Privilege	Email thread requesting and containing legal advice re: attached draft cache license.	Recipient Bawcutt, Tony - Microsoft Beckerman, Mike - Microsoft Friedman, Will - Microsoft Glueck, Sue - Microsoft (LCA) - Attorney Author Scheifelebin, Bill - Microsoft Custodian Bawcutt, Tony - Microsoft Author of Attachment Glueck, Sue - Microsoft (LCA) - Attorney

**Privilege Log**  
**Burst.com Inc. vs. Microsoft Corp**

Bates Range	Date	Privilege	Subject Matter	Names
PMS-CC-Bu 031161 -031165	07/11/2002	Attorney-Client Privilege	Email thread marked Attorney-Client Privileged requesting legal advice re: DRN protocol.	<p><u>Recipient</u>            Alkove, Jim - Microsoft            Anderson, Noel - Microsoft            Chellis, Gene - Microsoft            Ganeshan, K. - Microsoft            Glueck, Sue - Microsoft (LCA) - Attorney            Klemets, Andens - Microsoft            Kowalton, Chadd - Microsoft            Meyers, Chris - Microsoft (LCA) - Attorney            Pfenning, Thomas - Microsoft            Strom, Cliff - Microsoft            Syrek, Gary - Microsoft            Ward, Richard B. - Microsoft            Walker, Aric - Microsoft            Williamson, Mary - Preston Gates Ellis - Outside Counsel</p> <p><u>Author</u>            Batterberry, Troy - Microsoft</p> <p><u>Concise</u>            DeJong, Charlie - Microsoft            Poole, Will - Microsoft</p> <p><u>Custodian</u>            Batterberry, Troy - Microsoft</p>
PMS-CC-Bu 031166 -031175	07/25/2002	Attorney-Client Privilege	Email thread containing legal advice re: attached draft WM report.	<p><u>Recipient</u>            Batterberry, Troy - Microsoft            Gross, Michael - Shock Hardy &amp; Bacon - Outside Counsel            Westch, John - Microsoft (LCA) - Attorney</p> <p><u>Author of Attachment</u>            Gross, Michael - Shock Hardy &amp; Bacon - Outside Counsel</p> <p><u>Author</u>            Lenes, Jennifer - Microsoft (LCA)</p> <p><u>Concise</u>            Anderson, Noelle - Microsoft (LCA)</p> <p><u>Custodian</u>            Batterberry, Troy - Microsoft</p>

## Microsoft Privilege Log

### Burst v. Microsoft (updated hard copy document privilege log)

## Preston|Gates|Ellis LLP

Doc. No.	Date	Privilege	Subject Matter	Name
PBUR 0005000544 - 0005000546	8/22/2000	Attorney-Client Privilege / Portion Redacted	Email thread marked Attorney-Client Privileged requesting legal advice re: Windows Media SDK license. Produced as MS-CC-BU 9023212-9023214.	<u>Author</u> Friedman, Will - Microsoft <u>Copyee</u> Friedberg, Jeffrey - Microsoft Scheleibin, Bill - Microsoft <u>Custodian</u> Friedberg, Jeffrey - Microsoft <u>Recipient</u> Williamson, Mary - Preston Gates & Ellis - Outside Counsel
PBUR 0005000547 - 0005000548	3/17/2001	Attorney-Client Privilege / Portion Redacted	Handwritten marginalia containing legal advice re: Burst patent. Produced as MS-CC-BU 9023215-9023216.	<u>Author</u> Weresh, John - Microsoft (LCA) - Attorney <u>Custodian</u> Weresh, John - Microsoft (LCA) - Attorney
PBUR 0005000549 - 0005000679	8/26/2002	Attorney-Client Privilege	Memo marked Attorney-Client Privileged/Work Product containing legal advice with attached research, all prepared in anticipation of litigation re: Windows Media (WM) technology patents.	<u>Author</u> Gross, Michael - Shook Hardy & Bacon - Outside Counsel <u>Custodian</u> Weresh, John - Microsoft (LCA) - Attorney <u>Recipient</u> Poole, Will - Microsoft
PBUR 0005000680 - 0005000813	8/26/2002	Attorney-Client Privilege	Memo marked Attorney-Client Privileged/Work Product containing legal advice with attached research, all prepared in anticipation of litigation re: WM technology patents.	<u>Author</u> Gross, Michael - Shook Hardy & Bacon - Outside Counsel <u>Custodian</u> Weresh, John - Microsoft (LCA) - Attorney <u>Recipient</u> Poole, Will - Microsoft
PBUR 0005000814 - 0005000942	8/26/2002	Attorney-Client Privilege	Memo marked Attorney-Client Privileged/Work Product containing legal advice with attached research, all prepared in anticipation of litigation re: WM technology patents.	<u>Author</u> Gross, Michael - Shook Hardy & Bacon - Outside Counsel <u>Custodian</u> Weresh, John - Microsoft (LCA) - Attorney <u>Recipient</u> Poole, Will - Microsoft
PBUR 0005000943 - 0005001016	8/26/2002	Attorney-Client Privilege	Memo marked Attorney-Client Privileged/Work Product containing legal advice with attached research, all prepared in anticipation of litigation re: WM technology patents.	<u>Author</u> Gross, Michael - Shook Hardy & Bacon - Outside Counsel <u>Custodian</u> Weresh, John - Microsoft (LCA) - Attorney <u>Recipient</u> Poole, Will - Microsoft

## Microsoft Privilege Log

Burst v. Microsoft (updated hard copy document privilege log)

Doc. No.	Date	Privilege	Subject Matter	Name
PBUR 0005001163 - 0005001163	8/26/2002	Attorney-Client Privilege	Email soliciting information sufficient to provide legal advice in anticipation of litigation re: Burst patent opinion.	Author St. Clair, Mariah - Microsoft (LCA) Custodian LCA Conflicts Group - Microsoft (LCA) Recipient
		Work Product		Andersen, Noelle - Microsoft (LCA) Batterberry, Troy - Microsoft Gross, Michael - Shook Hardy & Bacon - Outside Counsel Jones, Jennifer - Microsoft (LCA) Poole, Will - Microsoft Wersch, John - Microsoft (LCA) - Attorney
PBUR 0005001164 - 0005001164	11/1/1999	Attorney-Client Privilege	Email thread containing legal advice re: Instant Video Technologies patents.	Author Chang, Sindis - Microsoft (LCA) - Paralegal Custodian LCA Conflicts Group - Microsoft (LCA) Name on Email Thread Schmidt, Kymeric - Microsoft (LCA) Recipient
				Walden, Tamara - Microsoft (LCA)
PBUR 0005001165 - 0005001167	3/1/2000	Attorney-Client Privilege	Email thread containing legal advice re: attached draft patent summary.	Author Schmidt, Kymeric - Microsoft (LCA) Author on attachment Eppenauer, Bart - Microsoft (LCA) - Attorney Schmidt, Kymeric - Microsoft (LCA) Converge Eppenauer, Bart - Microsoft (LCA) - Attorney Francisco, Janice - Microsoft (LCA) Custodian LCA Conflicts Group - Microsoft (LCA) Name on Email Thread Sherwick, Sandra - Microsoft (LCA) Wally, Katherine - Microsoft (LCA) Recipient
				Savacock, Victoria - Microsoft (LCA)

## Microsoft Privilege Log

### Burst v. Microsoft (updated hard copy document privilege log)

Doc. No.	Date	Privilege	Subject Matter	Names
PBUR 0005001288 - 0005001289	6/8/2001	Attorney-Client Privilege	Email requesting legal advice re: FEC patent disclosure.	Author Machin, Richard - Microsoft Copies Batterberry, Troy - Microsoft Stafford, Jane - Microsoft (LCA) Custodian LCA Patent Procurement Group - Microsoft (LCA) Recipient Jolly, Tom - Loc & Hayes - Outside Counsel
PBUR 0005001290 - 0005001290	4/25/2002	Attorney-Client Privilege	Email containing legal advice re: Instant Video Technologies patents.	Author Pipal, Christi - Microsoft (LCA) - Paralegal Copies Hoggard, Geoffrey - Microsoft (LCA) Custodian LCA Conflicts Group - Microsoft (LCA) Recipient Davidson, Ian - Microsoft (LCA) Kujath, Tamara - Microsoft (LCA)
PBUR 0005001291 - 0005001291	2/15/2002	Attorney-Client Privilege	Email thread soliciting information sufficient to provide legal advice re: patent file histories.	Author St. Clair, Mariah - Microsoft (LCA) Custodian LCA Conflicts Group - Microsoft (LCA) Recipient Gross, Mike - Shock Hardy & Bacon - Outside Counsel
PBUR 0005001292 - 0005001292	10/31/2001	Attorney-Client Privilege	Email soliciting information sufficient to provide legal advice re: Fast Startup patent.	Author Jones, Jennifer - Microsoft (LCA) Custodian LCA Conflicts Group - Microsoft (LCA) Recipient Batterberry, Troy - Microsoft Eppenauer, Bart - Microsoft (LCA) - Attorney St. Clair, Mariah - Microsoft (LCA) Werash, John - Microsoft (LCA) - Attorney
PBUR 0005001293 - 0005001293	12/4/2000	Attorney-Client Privilege	Memo containing legal advice re: patent prosecution history.	Author Werash, John - Microsoft (LCA) - Attorney Custodian LCA Conflicts Group - Microsoft (LCA) Recipient Microsoft Patent Group/File - Microsoft (LCA)

**Microsoft Privilege Log**

Burst v. Microsoft (updated hard copy document privilege log)

<b>Preston Gates Ellis LLP</b>					
<u>Doc. No.</u>	<u>Date</u>	<u>Privilege</u>	<u>Subject Matter</u>	<u>Name</u>	
PBUR 0005001371 - 0005001372	8/14/2002	Attorney-Client Privilege	Email thread soliciting information sufficient to provide legal advice re: Burst product description.	Author Jones, Jennifer - Microsoft (LCA)	
				Copyee Andreasen, Noelle - Microsoft (LCA)	
				Customer LCA Conflicts Group - Microsoft (LCA)	
				Name on Email Thread Batterberry, Troy - Microsoft	
				Waresch, John - Microsoft (LCA) - Attorney	
				Recipient Gross, Michael - Shook Hardy & Bacon - Outside Counsel	
PBUR 0005001373 - 0005001373	8/6/2002	Attorney-Client Privilege	Email thread soliciting information sufficient to provide legal advice re: Burst product description.	Author Jones, Jennifer - Microsoft (LCA)	
				Copyee Andreasen, Noelle - Microsoft (LCA)	
				Customer LCA Conflicts Group - Microsoft (LCA)	
				Recipient Batterberry, Troy - Microsoft	
				Gross, Michael - Shook Hardy & Bacon - Outside Counsel	
				Waresch, John - Microsoft (LCA) - Attorney	
PBUR 0005001374 - 0005001374	7/1/2002	Attorney-Client Privilege	Email soliciting information sufficient to provide legal advice re: Burst patents.	Author Jones, Jennifer - Microsoft (LCA)	
				Customer LCA Conflicts Group - Microsoft (LCA)	
				Recipient Batterberry, Troy - Microsoft	
				Gross, Michael - Shook Hardy & Bacon - Outside Counsel	
				Waresch, John - Microsoft (LCA) - Attorney	
PBUR 0005001375 - 0005001376	5/20/2002	Attorney-Client Privilege	Email thread soliciting information sufficient to provide legal advice and communicating information requested by Legal re: WM product.	Author Gross, Michael - Shook Hardy & Bacon - Outside Counsel	
				Customer LCA Conflicts Group - Microsoft (LCA)	
				Name on Email Thread Jones, Jennifer - Microsoft (LCA)	
				Shogbamini, Ladi - Shook Hardy & Bacon - Outside Counsel	
				Waresch, John - Microsoft (LCA) - Attorney	
				Recipient St. Clair, Mariah - Microsoft (LCA)	

## Microsoft Privilege Log

Burst v. Microsoft (updated hard copy document privilege log)

Doc. No.	Privilege	Date	Subject Matter	Names
PBUR 0005001377 - 0005001377	Attorney-Client Privilege	7/25/2002	Email thread soliciting information sufficient to provide legal advice re: Burst product description.	<u>Author</u> Jones, Jennifer - Microsoft (LCA) <u>Copyee</u> Andrean, Noelle - Microsoft (LCA) <u>Recipient</u> LCA Conflicts Group - Microsoft (LCA) <u>St. Clair, Mariah - Microsoft (LCA)</u> <u>Batterberry, Troy - Microsoft</u> <u>Gross, Michael - Shook Hardy &amp; Bacon - Outside Counsel</u> <u>Wersch, John - Microsoft (LCA) - Attorney</u>
PBUR 0005001378 - 0005001386	Attorney-Client Privilege	7/25/2002	Draft product description prepared by outside counsel subject to legal review/revision re: WM product.	<u>Author</u> <u>Gross, Michael - Shook Hardy &amp; Bacon - Outside Counsel</u> <u>Copyee</u> <u>St. Clair, Mariah - Microsoft (LCA)</u> <u>Batterberry, Troy - Microsoft</u> <u>Author on Attachment</u> <u>Gross, Michael - Shook Hardy &amp; Bacon - Outside Counsel</u> <u>Recipient</u> <u>St. Clair, Mariah - Microsoft (LCA)</u> <u>Wersch, John - Microsoft (LCA) - Attorney</u> <u>Customian, Ladi - Shook Hardy &amp; Bacon - Outside Counsel</u> <u>Shogbamimu, Ladi - Shook Hardy &amp; Bacon - Outside Counsel</u> <u>Name on Email Thread</u> <u>Recipient</u> <u>Jones, Jennifer - Microsoft (LCA)</u>
PBUR 0005001387 - 0005001394	Attorney-Client Privilege	5/20/2002	Email thread communicating information requested by outside counsel and soliciting information sufficient to provide legal advice re: attached draft product description.	<u>Author</u> <u>Gross, Michael - Shook Hardy &amp; Bacon - Outside Counsel</u> <u>Copyee</u> <u>St. Clair, Mariah - Microsoft (LCA)</u> <u>Wersch, John - Microsoft (LCA) - Attorney</u> <u>Customian, Ladi - Shook Hardy &amp; Bacon - Outside Counsel</u> <u>Name on Email Thread</u> <u>Shogbamimu, Ladi - Shook Hardy &amp; Bacon - Outside Counsel</u> <u>Recipient</u> <u>St. Clair, Mariah - Microsoft (LCA)</u> <u>Wersch, John - Microsoft (LCA) - Attorney</u> <u>Customian, Ladi - Shook Hardy &amp; Bacon - Outside Counsel</u> <u>Name on Email Thread</u> <u>Shogbamimu, Ladi - Shook Hardy &amp; Bacon - Outside Counsel</u> <u>Recipient</u> <u>Jones, Jennifer - Microsoft (LCA)</u>
PBUR 0005001395 - 0005001401	Attorney-Client Privilege	5/10/2002	Email thread soliciting information sufficient to provide legal advice re: attached draft product description.	<u>Author</u> <u>Jones, Jennifer - Microsoft (LCA)</u> <u>Author on Attachment</u> <u>Gross, Michael - Shook Hardy &amp; Bacon - Outside Counsel</u> <u>Copyee</u> <u>St. Clair, Mariah - Microsoft (LCA)</u> <u>Wersch, John - Microsoft (LCA) - Attorney</u> <u>Customian, Ladi - Shook Hardy &amp; Bacon - Outside Counsel</u> <u>Name on Email Thread</u> <u>Shogbamimu, Ladi - Shook Hardy &amp; Bacon - Outside Counsel</u> <u>Recipient</u> <u>Batterberry, Troy - Microsoft</u>

## Microsoft Privilege Log

Burst v. Microsoft (updated hard copy document privilege log)

Doc. No.	Date	Privilege	Attorney-Client Privilege	Subject Matter	Names
PBUR 0005001402 - 0005001403	5/3/2002	Attorney-Client Privilege		Email thread marked Attorney-Client privileged soliciting information sufficient to provide legal advice and communicating information requested by Legal re: Burst review.	<u>Author</u> Jones, Jennifer - Microsoft (LCA) <u>Copyee</u> St. Clair, Mariah - Microsoft (LCA) Weresh, John - Microsoft (LCA) - Attorney <u>Custodian</u> LCA Conflicts Group - Microsoft (LCA) <u>Name on Email Thread</u> Batterberry, Troy - Microsoft <u>Recipient</u> Gross, Michael - Shook Hardy & Bacon - Outside Counsel Shogbanimu, Ladi - Shook Hardy & Bacon - Outside Counsel
PBUR 0005001404 - 0005001419	5/2/2002	Attorney-Client Privilege		Email thread marked Attorney-Client privileged communicating information requested by Legal and soliciting information sufficient to provide legal advice re: attached draft WM specification.	<u>Author</u> Batterberry, Troy - Microsoft <u>Author on attachment</u> Batterberry, Troy - Microsoft <u>Copyee</u> St. Clair, Mariah - Microsoft (LCA) Weresh, John - Microsoft (LCA) - Attorney <u>Custodian</u> LCA Conflicts Group - Microsoft (LCA) <u>Recipient</u> Jones, Jennifer - Microsoft (LCA)
PBUR 0005001420 - 0005001422	4/17/2002	Attorney-Client Privilege		Email thread soliciting information sufficient to provide legal advice and containing legal advice with attached table re: patent applications.	<u>Author</u> St. Clair, Mariah - Microsoft (LCA) <u>Author on attachment</u> St. Clair, Mariah - Microsoft (LCA) <u>Custodian</u> LCA Conflicts Group - Microsoft (LCA) <u>Name on Email Thread</u> Jones, Jennifer - Microsoft (LCA) Weresh, John - Microsoft (LCA) - Attorney <u>Recipient</u> Gross, Michael - Shook Hardy & Bacon - Outside Counsel Shogbanimu, Ladi - Shook Hardy & Bacon - Outside Counsel

**Microsoft Privilege Log**

Burstein v. Microsoft (updated hard copy document privilege log)

**Preston|Gates|Ellis LLP**

Doc. No.	Date	Privilege	Subject Matter	Name
PBUR 0005001423 - 0005001424	4/17/2002	Attorney-Client Privilege	Email thread containing legal advice re: patent applications.	<u>Author</u> Wearath, John - Microsoft (LCA) - Attorney <u>Copy</u> Jones, Jennifer - Microsoft (LCA) <u>Custodian</u> LCA Conflicts Group - Microsoft (LCA) <u>Recipient</u> Gross, Mike - Shook Hardy & Bacon - Outside Counsel Shogbanimu, Ladi - Shook Hardy & Bacon - Outside Counsel St. Clair, Mariah - Microsoft (LCA)
PBUR 0005001425 - 0005001426	4/17/2002	Attorney-Client Privilege	Email thread soliciting information sufficient to provide legal advice re: patent applications.	<u>Author</u> St. Clair, Mariah - Microsoft (LCA) <u>Copy</u> Jones, Jennifer - Microsoft (LCA) Wearath, John - Microsoft (LCA) - Attorney <u>Custodian</u> LCA Conflicts Group - Microsoft (LCA) <u>Recipient</u> Gross, Mike - Shook Hardy & Bacon - Outside Counsel Shogbanimu, Ladi - Shook Hardy & Bacon - Outside Counsel St. Clair, Mariah - Microsoft (LCA)
PBUR 0005001427 - 0005001430	4/12/2002	Attorney-Client Privilege	Email thread soliciting information sufficient to provide legal advice with attached tables re: patent applications.	<u>Author</u> St. Clair, Mariah - Microsoft (LCA) <u>Author on attachment</u> St. Clair, Mariah - Microsoft (LCA) <u>Custodian</u> LCA Conflicts Group - Microsoft (LCA) <u>Name on Email Thread</u> Shogbanimu, Ladi - Shook Hardy & Bacon - Outside Counsel <u>Recipient</u> Jones, Jennifer - Microsoft (LCA) Wearath, John - Microsoft (LCA) - Attorney
PBUR 0005001431 - 0005001431	4/12/2002	Attorney-Client Privilege	Email thread soliciting information sufficient to provide legal advice re: patent applications.	<u>Author</u> Wearath, John - Microsoft (LCA) - Attorney <u>Custodian</u> LCA Conflicts Group - Microsoft (LCA) <u>Name on Email Thread</u> Shogbanimu, Ladi - Shook Hardy & Bacon - Outside Counsel <u>Recipient</u> Jones, Jennifer - Microsoft (LCA) St. Clair, Mariah - Microsoft (LCA)

**Microsoft Privilege Log**

Burst v. Microsoft (updated hard copy document privilege log)

**Preston|Gates|Ellis LLP**

Doc. No.	Date	Privilege	Subject Matter	Name
PBUR 0005001432 - 0005001432	4/9/2002	Attorney-Client Privilege	Email soliciting information sufficient to provide legal advice re: Burst matter.	<u>Author</u> Jones, Jennifer - Microsoft (LCA) <u>Custodian</u> LCA Conflicts Group - Microsoft (LCA) <u>Recipient</u> Bitterberry, Troy - Microsoft Gross, Michael - Shook Hardy & Bacon - Outside Counsel St. Clair, Mariah - Microsoft (LCA) Weresh, John - Microsoft (LCA) - Attorney
PBUR 0005001433 - 0005001433	3/14/2002	Attorney-Client Privilege	Email soliciting information sufficient to provide legal advice re: Burst patents.	<u>Author</u> Jones, Jennifer - Microsoft (LCA) <u>Copyee</u> St. Clair, Mariah - Microsoft (LCA) <u>Custodian</u> LCA Conflicts Group - Microsoft (LCA) <u>Recipient</u> Gross, Michael - Shook Hardy & Bacon - Outside Counsel
PBUR 0005001434 - 0005001437	1/1/2002	Attorney-Client Privilege	Handwritten notes containing legal advice with attached table re: Instant Video Technologies patents.	<u>Author</u> Weresh, John - Microsoft (LCA) - Attorney <u>Author on attachment</u> Weresh, John - Microsoft (LCA) - Attorney <u>Custodian</u> LCA Conflicts Group - Microsoft (LCA)
PBUR 0005001438 - 0005001439	8/21/2002	Attorney-Client Privilege	Letter communicating information requested by outside counsel re: Japanese patent application.	<u>Author</u> Tani, Yoshihiko - Tani & Abe - Outside Counsel <u>Custodian</u> Sidney/Lee & Hayes - Outside Counsel <u>Recipient</u> Jolby, Tom - Lee & Hayes - Outside Counsel
PBUR 0005001440 - 0005001441	5/13/2002	Attorney-Client Privilege	Email thread soliciting information sufficient to provide legal advice re: patent application.	<u>Author</u> Kirk, Laura - Kelly Services - Microsoft LCA Agent/Contractor <u>Custodian</u> Sidney/Lee & Hayes - Outside Counsel <u>Name on Email Thread</u> LHDocket - Lee & Hayes Patent Group Docketing Dept. - Microsoft (LCA) Schmidt, Kymene - Microsoft (LCA) Sponzeller, Allan - Lee & Hayes - Outside Counsel Stafford, Jane - Microsoft (LCA) Stewart, Jim - Microsoft Wynn, Tong - Microsoft <u>Recipient</u> Rothenberg, David - Microsoft

**Microsoft Privilege Log**

Burst v. Microsoft (updated hard copy document privilege log)

Doc. No.	Date	Privilege	Subject Matter	Names
PBUR 0005002167 - 0005002167	10/31/2001	Attorney-Client Privilege	Email soliciting information sufficient to provide legal advice re: patent review.	<u>Author</u> Jones, Jennifer - Microsoft (LCA) <u>Custodian</u> Weresh, John - Microsoft (LCA) - Attorney <u>Recipient</u> Batterberry, Troy - Microsoft Eppenauer, Bart - Microsoft (LCA) - Attorney St. Clair, Mariah - Microsoft (LCA) Weresh, John - Microsoft (LCA) - Attorney
PBUR 0005002168 - 0005002168	11/13/2001	Attorney-Client Privilege	Email thread containing legal advice re: Burst patent review.	<u>Author</u> Jones, Jennifer - Microsoft (LCA) <u>Custodian</u> Weresh, John - Microsoft (LCA) - Attorney <u>Recipient</u> St. Clair, Mariah - Microsoft
PBUR 0005002169 - 0005002169	2/6/2002	Attorney-Client Privilege	Email thread soliciting information sufficient to provide legal advice and communicating information requested by outside counsel re: Burst patent.	<u>Author</u> Jones, Jennifer - Microsoft (LCA) <u>Custodian</u> Weresh, John - Microsoft (LCA) - Attorney <u>Name on Email Thread</u> Schmidt, Kyndra - Microsoft (LCA) <u>Recipient</u> St. Clair, Mariah - Microsoft
PBUR 0005002170 - 0005002170	2/15/2002	Attorney-Client Privilege	Email thread communicating information requested by outside counsel re: patent file histories.	<u>Author</u> St. Clair, Mariah - Microsoft (LCA) <u>Custodian</u> Weresh, John - Microsoft (LCA) - Attorney <u>Recipient</u> Gross, Mike - Shook, Hardy & Bacon - Outside Counsel
PBUR 0005002171 - 0005002171	3/14/2002	Attorney-Client Privilege	Email soliciting information sufficient to provide legal advice re: Burst patents.	<u>Author</u> Jones, Jennifer - Microsoft (LCA) <u>Copy</u> St. Clair, Mariah - Microsoft (LCA) Weresh, John - Microsoft (LCA) - Attorney <u>Recipient</u> Gross, Michael - Shook, Hardy & Bacon - Outside Counsel

## Microsoft Privilege Log

Burst v. Microsoft (updated hard copy document privilege log)

Doc. No.	Date	Privilege	Subject Matter	Name
PBUR 0005002172 - 0005002172	4/17/2002	Attorney-Client Privilege	Email soliciting information sufficient to provide legal advice re: Burst patents.	<u>Author</u> Jones, Jennifer - Microsoft (LCA) <u>Custodian</u> Weresh, John - Microsoft (LCA) - Attorney <u>Recipient</u> Batterberry, Troy - Microsoft Gross, Michael - Shook Hardy & Bacon - Outside Counsel St. Clair, Mariah - Microsoft (LCA) Weresh, John - Microsoft (LCA) - Attorney
PBUR 0005002173 - 0005002173	4/12/2002	Attorney-Client Privilege	Email thread soliciting information sufficient to provide legal advice re: patent review.	<u>Author</u> Weresh, John - Microsoft (LCA) - Attorney <u>Custodian</u> Weresh, John - Microsoft (LCA) - Attorney <u>Name on Email Thread</u> Shogbamimu, Ladi - Shook Hardy & Bacon - Outside Counsel <u>Recipient</u> Jones, Jennifer - Microsoft (LCA) St. Clair, Mariah - Microsoft (LCA)
PBUR 0005002174 - 0005002177	4/12/2002	Attorney-Client Privilege	Email thread communicating information requested by outside counsel and soliciting information sufficient to provide legal advice with attached draft tables re: patent review.	<u>Author</u> St. Clair, Mariah - Microsoft (LCA) <u>Author on attachment</u> St. Clair, Mariah - Microsoft (LCA) <u>Custodian</u> Weresh, John - Microsoft (LCA) - Attorney <u>Name on Email Thread</u> Shogbamimu, Ladi - Shook Hardy & Bacon - Outside Counsel <u>Recipient</u> Jones, Jennifer - Microsoft (LCA) Weresh, John - Microsoft (LCA) - Attorney
PBUR 0005002178 - 0005002179	4/17/2002	Attorney-Client Privilege	Email thread communicating information requested by outside counsel and soliciting information sufficient to provide legal advice re: patent review.	<u>Author</u> St. Clair, Mariah - Microsoft (LCA) <u>Converge</u> Jones, Jennifer - Microsoft (LCA) <u>Custodian</u> Weresh, John - Microsoft (LCA) - Attorney <u>Recipient</u> Gross, Michael - Shook Hardy & Bacon - Outside Counsel Shogbamimu, Ladi - Shook Hardy & Bacon - Outside Counsel

**Microsoft Privilege Log**

Burst v. Microsoft (updated hard copy document privilege log)

Doc. No.	Date	Privilege	Subject Matter	Names
PBUR 0005002180 - 0005002182	4/17/2002	Attorney-Client Privilege	Email thread soliciting information sufficient to provide legal advice and communicating information requested by outside counsel with attached draft table re: patent review.	St. Clair, Mariah - Microsoft (LCA) Author Author on attachment St. Clair, Mariah - Microsoft (LCA) Custodian
PBUR 0005002183 - 0005002184	5/3/2002	Attorney-Client Privilege	Email thread marked Attorney-Client Privileged soliciting information sufficient to provide legal advice and communicating information requested by outside counsel re: streaming media technology.	Wearh, John - Microsoft (LCA) - Attorney Name on Email Thread Jones, Jennifer - Microsoft (LCA) Recipient Gross, Mike - Shook Hardy & Bacon - Outside Counsel Shogbanimu, Ladi - Shook Hardy & Bacon - Outside Counsel
PBUR 0005002185 - 0005002186	4/17/2002	Attorney-Client Privilege	Email thread soliciting information sufficient to provide legal advice and communicating information requested by outside counsel re: patent review.	St. Clair, Mariah - Microsoft (LCA) Author Author on attachment Wearh, John - Microsoft (LCA) - Attorney Name on Email Thread Batterberry, Troy - Microsoft Recipient Gross, Michael - Shook Hardy & Bacon - Outside Counsel Shogbanimu, Ladi - Shook Hardy & Bacon - Outside Counsel
PBUR 0005002187 - 0005002187	5/2/2002	Attorney-Client Privilege	Email thread communicating information requested by counsel and soliciting information sufficient to provide legal advice re: Burst patents.	St. Clair, Mariah - Microsoft (LCA) Author Batterberry, Troy - Microsoft Custodian Wearh, John - Microsoft (LCA) - Attorney Recipient Jones, Jennifer - Microsoft (LCA)

## Microsoft Privilege Log

Burst v. Microsoft (updated hard copy document privilege log)

Doc. No.	Date	Privilege	Subject Matter	Name
PBUR 0005002188 - 0005002194	5/10/2002	Attorney-Client Privilege	Email thread soliciting information sufficient to provide legal advice with attached draft product description re: WM patent.	<u>Author</u> Jones, Jennifer - Microsoft (LCA) <u>Author on attachment</u> Wereth, John - Shook Hardy & Bacon - Outside Counsel <u>Copyee</u> St. Clair, Mariah - Microsoft (LCA) Wereth, John - Microsoft (LCA) - Attorney <u>Custodian</u> Wereth, John - Microsoft (LCA) - Attorney <u>Name on Email Thread</u> Shogbanimu, Ladi - Shook Hardy & Bacon - Outside Counsel <u>Recipient</u> Batterberry, Troy - Microsoft
PBUR 0005002195 - 0005002202	5/20/2002	Attorney-Client Privilege	Email thread communicating information requested by counsel and soliciting information sufficient to provide legal advice with attached draft product description re: WM patent.	<u>Author</u> Batterberry, Troy - Microsoft <u>Author on attachment</u> Batterberry, Troy - Microsoft <u>Copyee</u> Gross, Michael - Shook Hardy & Bacon - Outside Counsel St. Clair, Mariah - Microsoft (LCA) Wereth, John - Microsoft (LCA) - Attorney <u>Custodian</u> Wereth, John - Microsoft (LCA) - Attorney <u>Name on Email Thread</u> Shogbanimu, Ladi - Shook Hardy & Bacon - Outside Counsel <u>Recipient</u> Jones, Jennifer - Microsoft (LCA)
PBUR 0005002203 - 0005002203	8/6/2002	Attorney-Client Privilege	Email thread soliciting information sufficient to provide legal advice re: WM patent.	<u>Author</u> Jones, Jennifer - Microsoft (LCA) <u>Copyee</u> Andreassen, Noelle - Microsoft (LCA) <u>Custodian</u> Wereth, John - Microsoft (LCA) - Attorney <u>Recipient</u> Batterberry, Troy - Microsoft Gross, Michael - Shook Hardy & Bacon - Outside Counsel Wereth, John - Microsoft (LCA) - Attorney

## Microsoft Privilege Log

Burst v. Microsoft (updated hard copy document privilege log)

Doc. No.	Date	Privilege	Subject Matter	Names
PBUR 0005002204 - 0005002213	7/25/2002	Attorney-Client Privilege	Email thread soliciting information sufficient to provide legal advice with attached draft product description re: WM patent.	<p>Author: Jones, Jennifer - Microsoft (LCA) Author on Email Thread: Gross, Michael - Shook Hardy &amp; Bacon - Outside Counsel</p> <p>Copy: Andersen, Noelle - Microsoft (LCA)</p> <p>Custodian: Wersch, John - Microsoft (LCA) - Attorney</p> <p>Recipient: Batterberry, Troy - Microsoft</p> <p>Gross, Michael - Shook Hardy &amp; Bacon - Outside Counsel</p> <p>Wersch, John - Microsoft (LCA) - Attorney</p>
PBUR 0005002214 - 0005002214	7/1/2002	Attorney-Client Privilege	Email soliciting information sufficient to provide legal advice in anticipation of litigation re: Burst patents.	<p>Author: St. Clair, Mariah - Microsoft (LCA)</p> <p>Custodian: Wersch, John - Microsoft (LCA) - Attorney</p> <p>Recipient: Batterberry, Troy - Microsoft</p> <p>Gross, Michael - Shook Hardy &amp; Bacon - Outside Counsel</p> <p>Jones, Jennifer - Microsoft (LCA)</p> <p>Wersch, John - Microsoft (LCA) - Attorney</p>
PBUR 0005002215 - 0005002216	3/20/2002	Attorney-Client Privilege	Email thread soliciting information sufficient to provide legal advice and communicating information requested by counsel re: Burst patent.	<p>Author: Gross, Michael - Shook Hardy &amp; Bacon - Outside Counsel</p> <p>Custodian: Wersch, John - Microsoft (LCA) - Attorney</p> <p>Name on Email Thread: Batterberry, Troy - Microsoft</p> <p>Jones, Jennifer - Microsoft (LCA)</p> <p>Shagbamini, Ladi - Shook Hardy &amp; Bacon - Outside Counsel</p> <p>Recipient: St. Clair, Mariah - Microsoft (LCA)</p>
PBUR 0005002217 - 0005002218	8/14/2002	Attorney-Client Privilege	Email thread soliciting information sufficient to provide legal advice re: WM patent.	<p>Author: Jones, Jennifer - Microsoft (LCA)</p> <p>Copy: Andersen, Noelle - Microsoft (LCA)</p> <p>Custodian: Wersch, John - Microsoft (LCA) - Attorney</p> <p>Name on Email Thread: Batterberry, Troy - Microsoft</p> <p>Wersch, John - Microsoft (LCA) - Attorney</p> <p>Recipient: Gross, Michael - Shook Hardy &amp; Bacon - Outside Counsel</p>

# **EXHIBIT 45**

**From:** Bill Gates  
**Sent:** Wednesday, October 15, 1997 9:59 AM  
**To:** Bill Gates; Jim Allchin (Exchange); Joachim Kempin; Rich Tong; On Lee; Marshall Brumer; Mike Porter; Craig Mundie; Jonathan Roberts; Adam Taylor  
**Cc:** Christine Turner  
**Subject:** RE: Discussion about Intel

A message I sent to Andy this morning:

-----Original Message-----

**From:** Bill Gates  
**Sent:** Wednesday, October 15, 1997 9:48 AM  
**To:** Andy Grove  
**Subject:** RE: Heads up

I'll see what I can do on the demonstration.

One thing I need some help on is to understand your tentative NC plans. Will Swoopa came and presented a plan that had a \$500 and \$700 NC which were cheaper than the NeIPC. We need to understand what hardware changes allow for the lower cost. The most demanding application - the biggest, the one that pages the most and grows the fastest is the browser. The PC can run diskless as well as any other device.

Our whole plan had been to tell people to write applications assuming the latest Intel processor. Hydra because it has no local execution model does not encourage redirection of the industry to applications that don't push the processor. The load on the server uses up the chip power and with full compatibility the user moves up to a state of the art client. However Intel seems now to think exposing APIs on cheap clients and directing development there is a good idea. I need to understand this better.

This is fairly important for seeing if we can get back in sync or not.

One of the interesting things about NCs/JAVA is the byte codes. The byte codes controlled by SUN will eliminate the compatibility problems of running software on different microprocessors. We are assuming that someone at Intel has decided that it ok to endorse byte codes. We didn't think byte codes made sense but since the call from Gelsinger we have been looking at this a whole new way. I will discuss this next Wednesday. One breakthrough involves the ability to ship software in C, Visual Basic - all Microsoft software in byte codes very easily in the next 6 months

-----Original Message-----

**From:** Andy Grove [SMTP:Andy\_Grove@ccm.sc.intel.com] <mailto:  
[SMTP:Andy\_Grove@ccm.sc.intel.com]>  
**Sent:** Tuesday, October 14, 1997 6:10 PM  
**To:** Bill Gates  
**Subject:** Heads up

Bill,

I just walked through my demos for Agenda.

I have some 8 demos, all looking super. However, I have a problem I have chartered our people to develop two special demos for me that would illustrate how our processors shine in new environments: one, in a set top computer running Navio sw, and another, running Win CE. Navio works, and looks good; the WinCE demo (Rel 2.0) booted up for the first time today on a Pentium MMX --- and runs a simple word processor. It's not very exciting.

I realize it's late in the game but if your people can come through with something whizzy, I'd love to show it. My talk is next Tue morning.

a

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**From:** Jonathan Roberts  
**Sent:** Wednesday, October 15, 1997 8:12 PM  
**To:** Bill Gates  
**Subject:** RE: Discussion about Intel

this is a great piece of mail. It is not a rant, but a very logical dissection of the issue with the threat of thermal nuclear war very well and politely delivered.

-----Original Message-----

**From:** Bill Gates  
**Sent:** Wednesday, October 15, 1997 9:59 AM  
**To:** Bill Gates; Jim Alchin (Exchange); Joachim Kempin; Rich Tong; On Lee; Marshall Brunner; Mike Porter; Craig Mundie; Jonathan Roberts; Adam Taylor  
**Cc:** Christine Turner  
**Subject:** RE: Discussion about Intel

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**To:** 'Andy Grove'  
**Subject:** RE: Heads up

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Our whole plan had been to tell people to write applications assuming the latest Intel processor. Hydra because it has no local execution model does not encourage redirection of the industry to applications that don't push the processor. The load on the server uses up the chip power and with full compatibility the user moves up to a state of the art client. However Intel seems now to think exposing APIs on cheap clients and directing development there is a good idea. I need to understand this better.

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# **EXHIBIT 46**

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CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSEIN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

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CVHYNIX SEMICONDUCTOR INC., HYNIX  
SEMICONDUCTOR AMERICA INC.,  
HYNIX SEMICONDUCTOR U.K. LTD., and  
HYNIX SEMICONDUCTOR  
DEUTSCHLAND GmbH,

No. CV-00-20905 RMW

ORDER COMPELLING PRODUCTION OF  
DOCUMENTS (Spoliation - Redacted Public  
Version)

[Re: Docket No. 697]

Plaintiffs,

v.

RAMBUS INC.,

Defendant.

By the present motion plaintiffs Hynix Semiconductor Inc., Hynix Semiconductor America Inc., Hynix Semiconductor U.K. Ltd., and Hynix Semiconductor Deutschland GmbH ("Hynix") seek an order compelling defendant Rambus Inc. ("Rambus") to produce documents obtained and deposition testimony taken in its ongoing litigation against Infineon Technologies AG ("Infineon") regarding Rambus's document retention policy and destruction of documents pursuant to that policy.

Hynix previously moved to dismiss patent claims asserted by Rambus as a sanction for litigation misconduct, alleging that Rambus's implementation of its document retention policy in 1998 resulted in spoliation of evidence critical to Hynix's defense against those patent claims. In so doing, Hynix asserted that a finding of spoliation by Judge Payne in *Rambus, Inc. v. Infineon Techs.*

1 AG, 222 F.R.D. 280, 297 (E.D. Va. 2004), had collateral estoppel effect in this matter. In the  
2 alternative, Hynix moved to compel documents pertaining to the Rambus document retention policy  
3 so that it could independently establish the extent to which Rambus had engaged in spoliation.  
4 Rambus objects to Hynix's motion to compel on the grounds that the documents Hynix seeks are  
5 subject to the attorney-client privilege. Hynix argues that the crime-fraud exception applies to these  
6 documents, thereby making the privilege unavailable to Rambus. After conducting an *in camera*  
7 review of the contested documents, the court requested the parties to submit additional briefing on  
8 the question of whether the crime-fraud exception to the attorney-client privilege applies. The court  
9 has reviewed the requested briefing and, on January 28, 2005, heard argument on the matter. The court  
10 concludes that there is sufficient cause to believe that Rambus has engaged in spoliation to  
11 justify discovery of certain otherwise privileged documents and orders those documents produced to  
12 Hynix for review.

13 **I. FACTS**

14 In July 1998, Rambus, through its Vice President of Intellectual Property, Joel Karp,  
15 distributed a two-page document retention policy to Rambus employees. O'Rourke Dec. Supp Mot.  
16 Diamiss ("O'Rourke Dec."), Ex. 24. This document retention policy was developed by Rambus with  
17 the assistance of outside counsel. On September 3, 1998, Rambus organized the first of its "Shred  
18 Days." After being instructed on Rambus's document retention policy, employees were given burlap  
19 bags and told to clear their workspaces of documents according to the policy. Rambus's initial Shred  
20 Day apparently resulted in the destruction of approximately 20,000 pounds of documents. Rambus  
21 held a second Shred Day in August 1999, and a third in conjunction with a December 2000 move of  
22 its offices to new facilities.

23 In June 1999, Rambus obtained the first of the patents-in-suit, U.S. Patent No. 5,915,105,  
24 covering DDR SDRAM devices. In September 1999 it obtained U.S. Patent No. 5,953,263 thought  
25 to cover an SDRAM device that was in high-volume production by its competitors. Rambus  
26 commenced suit against Hitachi based on these patents in January 2000. Since the Hitachi suit,  
27 Hynix, Micron, Inc., and Infineon have been subject to patent infringement claims on the same  
28 patents.

1 In late 1997 or early 1998, Rambus hired Joel Karp, a non-lawyer, as its Vice President of  
2 Intellectual Property. Karp brought with him a belief that Rambus's intellectual property covered  
3 SDRAM technology and began to propose to Rambus a licensing and litigation strategy targeting  
4 SDRAM manufacturers in the industry. At Karp's direction, Rambus met with attorneys from Cooley  
5 Godward LLP ("Cooley Godward"), [REDACTED] to discuss  
6 setting up a general licensing and litigation strategy on February 12, 1998. [REDACTED]

7 [REDACTED] Prior to 1998, Rambus  
8 did not have a formal document retention policy and it characterizes its employees as "pack rats"  
9 who had retained an unwieldy volume of documents.

10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED] Rambus continued to work with outside counsel to develop its document retention policy  
14 through the summer of 1998. In July 1998, [REDACTED] assisted Karp in developing internal  
15 presentations regarding the document retention policy for presentation to Rambus managers and the  
16 company at large prior to implementing the document retention policy in September 1998. In late  
17 December 1999 and early January 2000, Rambus's patent counsel, Neil Steinberg, who was hired in  
18 April 1999, and Karp established a litigation hold by instructing Rambus employees and outside  
19 counsel with potentially relevant documents to retain such documents.<sup>1</sup>

## II. ANALYSIS

#### A. Spoliation Can Constitute Basis for Exception to Attorney-Client Privilege

22                   Communications otherwise protected by the attorney-client privilege are not protected if the  
23 communications are made in furtherance of a crime or fraud. *United States v. Zolin*, 491 U.S. 554,  
24 563 (1989); *United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002) ("When a lawyer's advice is

26 The court has shadowed all material that has been redacted from the public copy of  
this order. If Rambus believes some material it asserts is privileged has not been redacted, it should  
advise the court immediately.

<sup>2</sup> Rambus argues that this litigation hold on the document retention policy was in effect during Rambus's December 2000 move to new facilities. Hynix has presented no evidence contradicting this assertion.

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1 sought to further a crime or fraud, those communications are not privileged."). "It is the purpose of  
2 the crime-fraud exception . . . to assure that the 'seal of secrecy' between lawyer and client does not  
3 extend to communications made for the purpose of getting advice for the commission of a fraud or  
4 crime." *United States v. Bauer*, 132 F.3d 504, 509 (9th Cir. 1997) (quoting *Zolin*, 491 U.S. at 563).  
5 Accordingly, the Ninth Circuit provides that "[t]he protection afforded by the attorney-client  
6 privilege does not extend to any communication 'in furtherance of intended, or present, continuing  
7 illegality.'" *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996) (internal quotation and  
8 citation omitted). Thus, the crime or fraud exception applies if the attorney-client communications  
9 "were in furtherance of an intended or present illegality and . . . there is some relationship between  
10 the communications and the illegality." *Bauer*, 132 F.3d at 509.

11 Hynix bears the burden of proving that the attorney-client privilege does not apply to the  
12 documents at issue under the crime-fraud exception. *United States v. Laurins*, 857 F.2d 529, 540 (9th  
13 Cir. 1988). "To trigger the crime-fraud exception, the [party seeking to pierce the privilege] must  
14 establish that the client was engaged in or planning a criminal or fraudulent scheme when it sought  
15 the advice of counsel to further the scheme." *In re Grand Jury Proceedings*, 87 F.3d at 381. The  
16 crime or fraud need not be proved beyond a reasonable doubt, "[r]ather, the district court must find  
17 reasonable cause to believe that the attorney's services were utilized in furtherance of the ongoing  
18 unlawful scheme." *Id.*; *see also Bauer*, 132 F.3d at 509.

19 Here, Hynix asserts that Rambus has engaged in spoliation, which is a misdemeanor crime  
20 under California law. Cal. Penal Code § 135. Section 135 provides:

21 Every person who, knowing that any book, paper, record, instrument in  
22 writing or other matter or thing, is about to be produced in evidence  
23 upon any trial, inquiry, or investigation whatever, authorized by law,  
willfully destroys or conceals the same, with intent thereby to prevent  
it from being produced, is guilty of a misdemeanor.

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1 *Id.* Hynix thus asks the court to determine that there is reasonable cause to believe that Rambus's  
2 counsel's services were utilized in furtherance of a scheme to commit misdemeanor spoliation under  
3 California law.<sup>3</sup>

4 Hynix and Rambus do not contest that the document retention policy resulted in the  
5 destruction of documents. They dispute, first, whether Rambus had the requisite intent to prevent the  
6 destroyed documents from being produced in an anticipated litigation and, second, whether the  
7 document retention policy resulted in the destruction of any relevant documents.

8 **B. Intent to Prevent Production in Anticipated Litigation**

9 In general, before spoliation may be found, "the party having control over the evidence must  
10 have had an obligation to preserve the evidence at the time it was destroyed." *Kronisch v. United*  
11 *States*, 150 F.3d 112, 126 (2d Cir. 1998). Under California law, that obligation is expressed as  
12 "knowing that [any document] is about to be produced in evidence upon any trial, inquiry, or  
13 investigation . . ." Cal. Penal Code § 135.

14 Rambus contends that California criminal law requires the litigation to be both anticipated  
15 and imminent. Rambus argues that because no litigation was imminent at the time it implemented  
16 the document retention policy and because it established a litigation hold on the policy in the month  
17 or so leading up to the Hitachi litigation, a finding of spoliation is not warranted. As Hynix points  
18 out, California's penal statutes are to be construed ". . . according to the fair import of their terms,  
19 with a view to effect [their] objects and to promote justice." *People v. Fields*, 105 Cal. App. 3d 341,  
20 343 (1980) (examining whether Penal Code § 135 applies only to items described in the statute or  
21 extends to other types of evidence). Requiring litigation to be imminent as well as anticipated for a  
22 finding of spoliation would permit companies to destroy documents while intending to commence

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24  
25 <sup>3</sup> Hynix also argues that spoliation "strikes at the very foundations of the adversary  
26 system and judicial process," *In re Sealed Case*, 754 F.2d 395, 401 (D.C. Cir. 1985), and thus that  
27 the court may pierce the attorney-client privilege because consultation with an attorney to commit  
28 spoliation is a fraud on the court. Rambus, on the other hand, argues that courts have generally  
rejected applying the crime-fraud exception where the accused wrong is merely a tort. See, e.g.,  
*Freedom Trust v. Chubb Group of Ins. Cos.*, 38 F. Supp. 2d 1170, 1172 (C.D. Cal. 1999) ("[T]o go  
beyond the conventional exceptions would open up 'too large an area of nullification of the  
privilege...'). As set forth in the discussion below, it is difficult to see how spoliation would not  
constitute such a fraud.

1 litigation without encountering spoliation liability, so long as the company waited long enough after  
2 destroying evidence to file suit. Rambus's interpretation would not "effect the object" of Penal Code  
3 § 135, nor would it promote justice. Thus, where a party anticipates litigation, it becomes obligated  
4 to preserve evidence relevant to the litigation. *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591  
5 (4th Cir. 2001) ("The duty to preserve material evidence arises not only during litigation but also  
6 extends to that period before the litigation when a party reasonably should know that the evidence  
7 may be relevant to anticipated litigation.") (citing *Kronisch*, 150 F.3d at 126). As set forth below, the  
8 court concludes that Rambus anticipated litigation at the time it implemented its document retention  
9 policy.

10 Rambus argues that there is no evidence that its outside counsel assisted the development of  
11 its document retention policy with knowledge of anticipated litigation or intending to prevent  
12 production of any document. Based on the document retention policy distributed by Karp [REDACTED]  
13 [REDACTED], there appears to  
14 be nothing necessarily improper about the document retention policy [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

22 However, when determining whether the crime-fraud exception applies to documents  
23 claimed to be attorney-client privileged, the attorney's intent and knowledge are not dispositive. The  
24 court examines the client's knowledge and intent in committing the crime or fraud at issue. *Martin*,  
25

26 \* Rambus stated in its papers and asserted in oral argument that it is an industry-wide  
27 practice to remove documents from patent prosecution files in order to conform them to the USPTO  
28 file after the patent has issued. The court has doubt as to whether this practice is standard in patent  
prosecution practice, and, to the extent it is, questions the propriety of the practice. It is clear,  
however, that such a practice would not be appropriate when specific litigation is anticipated or  
pending.

1 278 F.3d at 1001. ("It does not matter that [the attorney] was unaware of [his client's] criminal  
2 purpose or that he took no affirmative step to further that purpose; the client's knowledge and  
3 intentions control.") (citing *In re Grand Jury Proceedings*, 87 F.3d at 381-82). The question, then, is  
4 whether Rambus had commenced or intended to commence litigation at the time it implemented its  
5 document retention policy and began destroying documents pursuant to its guidelines.

6 The non-privileged evidence submitted by Hynix in the original motion to dismiss establishes  
7 that Rambus anticipated commencing litigation against industry competitors at least as of the second  
8 Shred Day in August 1999. A document titled "IP Q3 '99 Goals – First Cut" lists the following as  
9 bullet items under the heading "Licensing/Litigation Readiness":

10       D.     Prepare licensing positions against 3 manufacturers  
11       E.     Prepare litigation strategy against 1 of the 3 manufacturers (re:  
12               3D)  
13       F.     Ready for litigation with 30 days notice  
14       G.     Organize 1999 shredding party at Rambus

15 O'Rourke Decl., Ex. 15. [REDACTED]

16 [REDACTED]

17 [REDACTED] By February 1998, the same month Rambus first consulted with Cooley  
18 Godward, Rambus had begun to develop its litigation strategy against competitors in the industry.  
19 And the evidence is clear that as of the date of the first Shred Day in September 1998 Rambus had  
20 formulated its litigation campaign and demonstrated its intent to commence litigation against  
21 accused infringers.

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

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18 At oral argument, Rambus suggested that the patents-in-suit had not issued at the time it  
19 implemented its document retention policy and thus Rambus could not have anticipated litigation.  
20 However, the evidence demonstrates that Rambus was nonetheless considering litigation based on its  
21 unissued patents. [REDACTED]

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] there is no evidence that Rambus modified its  
planned document retention policy once it began making significant progress toward commencing  
litigation against its competitors. [REDACTED] that litigation plan  
was well underway when Rambus undertook its first Shred Day in September 1998. From this  
progression, [REDACTED]  
[REDACTED] the court reasonably infers that Rambus anticipated litigation before the initial September  
1998 Shred Day.

Rambus argues that there is no evidence that its adoption of a document retention policy was  
intended to prevent the production of documents in the event of litigation. It has cited deposition  
testimony that its primary discovery-related concerns prompting it to institute a document retention  
policy related only to the costs of searching through Rambus's backlog of documents. For example,  
Karp testified that his concern about retaining backup tapes absent a document retention policy was  
that, in the event of a production request, determining what the tapes contained "would be beyond  
human endurance." Ostroff Dec. Supp. *In Camera* Br. ("Ostroff Dec."), Ex. 11, Joel Karp Dep. at  
348. A former Rambus employee, Richard Barth, confirmed his recollection of Karp's document  
retention policy stating "I don't recall him being so much worried about documents that were harmful  
to Rambus in that it would reveal you know, some dastardly secret . . . [t]he concern was that if we  
had to go and grind through all that and produce it, it would just kill us." *Id.*, Ex. 10, Richard Barth  
*Micron* Dep. at 343-344.

Rambus's concerns about the volume of material through which it would have to search are  
borne out in the *in camera* documents, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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3 While these policies may have been appropriately implemented in the absence of anticipated  
4 litigation, they were inadequate given the evidence of Rambus's progressing litigation plan. Thus, the  
5 court finds that there is reasonable cause to believe that Rambus anticipated litigation at the time it  
6 implemented its document retention policy on September 3, 1998 and through its institution of a  
7 litigation hold in December 1999.

8 **C. Destruction of Relevant Documents**

9 The next inquiry is whether Rambus destroyed evidence relevant to the litigation pursuant to  
10 its document retention policy. See Cal. Penal Code § 135 (crime of spoliation requires that the  
11 document is "to be produced in evidence"); *see also United States v. Kitsap Physicians Serv.*, 314  
12 F.3d 995, 1002 (9th Cir. 2002) (parties "engage in spoliation of documents as a matter of law only if  
13 they had 'some notice that the documents were potentially relevant' to the litigation before they were  
14 destroyed.") (citing *Akiona v. United States*, 938 F.2d 158, 161 (9th Cir. 1991)).

15 The two courts to have previously considered the spoliation implications of Rambus's  
16 document retention plan came to different conclusions regarding whether material documents were  
17 discarded pursuant to Rambus's document retention policy. The FTC Administrative Law Judge,  
18 while describing Rambus's actions as "troublesome," found "no indication that any documents,  
19 relevant and material to the disposition of the issues in this case, were destroyed." *In re Rambus,*  
20 *Inc.*, 2004 WL 390647 (FTC Feb. 23, 2004). Judge Payne in the *Infineon* litigation, however, found  
21 that "[t]he destroyed documents appear to have included many of the kinds of documents usually  
22 generated in the course of business that contain information that is useful in ascertaining truth and in  
23 testing the validity of positions taken in litigation, e.g., email communications, notes of license  
24 negotiations, contract drafts, as well as information about activities at JEDEC." *Rambus v. Infineon*,  
25 222 F.R.D. at 297.

26 Hynix has not demonstrated what particular material evidence was destroyed, but due to the  
27 implementation of the document retention policy, it obviously faces a difficult task in identifying the  
28 specific documents that have been made unavailable. What is known based on documents submitted

1 by both Hynix and Rambus is that pursuant to Rambus's document retention policy, employees were  
2 encouraged to discard certain categories of documents. [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 Hynix argues that this instruction to Rambus employees resulted in the destruction of material  
7 documents. In support of its argument, it has produced some evidence regarding what documents  
8 may have been destroyed.

9 Hynix cites deposition testimony of Richard Crisp, Rambus's JEDEC representative, that he  
10 discarded JEDEC-related documents in compliance with Karp's document retention policy.

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED] Rambus counters that Crisp did not destroy  
18 anything material. Crisp testified before the FTC ALJ that he took care to preserve copies of  
19 electronic records of JEDEC-related materials, which he described as trip reports and  
20 contemporaneous notes, by sending them to his computer at home when he found it too difficult to  
21 transfer them to the server at Rambus. He testified to turning over copies of these documents to  
22 Steinberg when he later discovered them. The destroyed JEDEC-related paper materials, Crisp  
23 testified, were mostly unopened ballots, paper copies of meeting minutes and copies of JEDEC  
24 standards that had been passed. Ostroff Dec., Ex. 26, Off. Tr. of Trial Proceedings, *In re Rambus*,  
25 Inc., D09302 at 3570-3574 (May 28, 2003).

26 The reliability of Crisp's testimony has been called into question by Judge Payne's findings in  
27 the original trial in the *Infineon* matter. When addressing Infineon's assertions of litigation  
28 misconduct against Rambus, Judge Payne found that Rambus had failed to list notes by Lester

1 Vincent on its privilege log establishing "that Rambus' JEDEC representative Richard Crisp was  
2 intimately involved in the patent-drafting efforts -- an involvement which Crisp denied under oath in  
3 deposition." *Rambus, Inc. v. Infineon Technologies AG*, 155 F. Supp. 2d 668, 681 (D. Va. 2001).  
4 This court views Judge Payne's finding on this matter to be significant.

5 The destruction of some JEDEC-related materials at a time when litigation was being  
6 considered, the discarding of some patent prosecution records, and the questioned credibility of the  
7 Rambus's witness to the disposal of records does provide reasonable cause to believe that relevant  
8 material documents were destroyed pursuant to Rambus's document retention policy.

9 At oral argument, Hynix emphasized that documents that should have been produced from  
10 inventor Mark Horowitz had been destroyed. Horowitz, a part-time employee of Rambus, was one of  
11 two participants in meetings with IBM and a key inventor of the patents-in-suit. He testified that he  
12 took notes at these meetings. During one of the Shred Days, documents in his office were cleared out  
13 while he was absent. [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

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The court finds the question of whether Hynix has presented sufficient evidence to support a finding of reasonable cause to believe that Rambus destroyed documents relevant to the litigation it then anticipated instituting to be a close one. However, the court so finds but emphasizes that it has only found reasonable cause to believe spoliation occurred, which is not the same as finding that Rambus did, in fact, spoliate evidence.

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#### **D. Some Relationship Between the Communications and Illegality**

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Once reasonable cause for spoliation or fraud has been established, there still must be a showing that there is some relationship between the communications and the asserted illegality to allow piercing of the attorney-client privilege. *Bauer*, 132 F.3d at 509. Hynix asserts that all of the documents produced pursuant to Judge Payne's order over which Rambus asserts privilege are closely related to the spoliation scheme. The court agrees that the documents produced *in camera* link the document retention program with Rambus's licensing and litigation strategy and show the progression of Rambus's plans to litigate against certain defendants in advance of the Shred Days.

*See Rambus v. Infineon*, 222 F.R.D. at 297.

**III. ORDER**

1                   2 The court hereby orders:

3                   4 1. By Thursday, February 3, 2005, Rambus shall produce to Hynix all discovery previously  
5                   6 ordered produced in the *Infineon* litigation pertaining to Rambus's document retention plan,  
7                   8 including the plan's conception, development, adoption, implementation and relationship to  
9                   10 Rambus's patent litigation strategy.

11                  12 2. Rambus shall also produce by February 3, 2005 all deposition transcripts and orders of the  
13                  14 *Infineon* court which discuss or relate to the topics set forth in 1. above.

15                  16 3. On February 3, 2005, unless this order is stayed, the court will make the redacted copy of this  
17                  18 order publically available.

19                  20 4. Should Rambus file a writ of mandate or other appellate proceedings to contest this order, the  
21                  22 production of the above documents will be automatically stayed for ten (10) days or until the  
23                  24 date on which the court of appeals rules on a further stay, whichever occurs first;

25                  26 5. No additional depositions or other discovery shall be permitted as a result of this order absent  
27                  28 agreement of the parties or court order after application to the court stating specifically what  
discovery is being sought on the issue of spoliation.

1                   2 6. Hynix's original motion to dismiss as a sanction for litigation misconduct shall proceed on  
the following schedule:

19                  20     a. Hynix's supplemental brief on its motion to dismiss as a litigation sanction: February  
18, 2005

21                  22     b. Rambus's supplemental opposition brief: February 25, 2005

23                  24     c. Hynix's supplemental reply brief: March 2, 2005

25                  26     d. Hearing on Hynix's motion to dismiss: March 11, 2005

25                  26 DATED:

1/31/05

*Ronald M. Whyte*  
RONALD M. WHYTE  
United States District Judge

1 THIS SHALL CERTIFY THAT A COPY OF THIS ORDER WAS PROVIDED TO:

2 Counsel for Plaintiff:

3 Kenneth L. Nissly  
Susan van Keulen  
4 Geoffrey H. Yost  
Thelen Reid & Priest LLP  
5 225 West Santa Clara Street,  
12th Floor  
6 San Jose, CA 95113-1723

7 Theodore G. Brown, III  
Townsend & Townsend & Crew LLP  
8 379 Lytton Ave  
Palo Alto, CA 94301

9 Patrick Lynch  
10 Kenneth R. O'Rourke  
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11 400 So Hope St Ste 1060  
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12 Counsel for Defendant:

14 Gregory P. Stone  
Kelly M. Klaus  
15 Andrea W. Jeffries  
Munger Tolles & Olson  
16 355 So Grand Ave Ste 3500  
Los Angeles, CA 90071-1560

17  
18  
19  
20 Date: 1/31/05

*umag*  
Chambers of Judge Whyte

22  
23  
24  
25  
26  
27  
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# **EXHIBIT 49**

*HIGHLY CONFIDENTIAL  
SUBJECT TO PROTECTIVE ORDER*

**UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND**

IN RE MICROSOFT CORP. )  
ANTITRUST LITIGATION ) MDL Docket no. 1332  
)  
BURST.COM, INC., )  
Plaintiff, ) Civil Action No. JFM-02-cv-2952  
)  
v. )  
MICROSOFT CORPORATION )  
Defendant. )  
)

**EXPERT REPORT OF SHARON OSTER, Ph.D.**

**February 10, 2005**

**HIGHLY CONFIDENTIAL  
SUBJECT TO PROTECTIVE ORDER**

companies bankrupt and an equal number that have shut shop, as many as 600,000 telecom workers are now without a paycheck." "The biggest bubble in the history of the modern world was not the dot-com bubble but the telecom bubble."<sup>167</sup>

The general market decline led to a significant decrease in venture capital investing. As Exhibit 12 shows, venture capital investment in the software industry declined from \$21.1 billion in 2000 to \$8.9 billion in 2001.<sup>168</sup> Burst was not unaffected by this drop in funding. In April 2002, Richard Lang wrote, "In 2001 we witnessed the implosion of the capital markets, especially in the technology sector. The market downturn and our limited revenues forced us to cancel plans for growth, radically downsize our staff and completely rethink our market strategy."<sup>169</sup> In an early 2002 interview, Richard Lang stated, "Our investors wanted us to compete with RealNetworks, Apple, and Microsoft ... The required growth was too ambitious, given what was happening in the capital markets."<sup>170</sup>

#### **IV. PATENT DAMAGES – REASONABLE ROYALTY**

##### **A. Hypothetical Negotiation Framework**

In addition to analyzing Burst's business strategy, I have been asked to analyze damages due to Burst in the event that Microsoft is found liable for infringement of Burst's patented technology. Specifically, I have analyzed reasonable royalty damages in the context of a "hypothetical negotiation" between the licensor, here Burst, and the licensee, here Microsoft, over the rights to the patents-in-suit. The patents are assumed to be valid and infringed and the two parties to the negotiation are assumed to be willing to negotiate a non-exclusive, naked license to the patents-in-suit. The hypothetical negotiation is assumed to take place immediately prior to the date of first infringement. In this case, the first sale of the allegedly infringing

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<sup>167</sup> Malik, Om, Broadbandits, John Wiley & Sons, Inc. (2003), pp. ix - x.

<sup>168</sup> Thomson Venture Economics, 2004 National Venture Capital Association Yearbook (2004), p. 48.

<sup>169</sup> Lang, Richard, "Message from the Chairman," April 17, 2002. Available at <http://www.burst.com/new/news/events/press.htm> <viewed January 13, 2004>.

<sup>170</sup> Stevens, Loralee, "Wild ride lands a new Burst.com in Santa Rosa," *North Bay Business Journal*, February 25, 2002 (BUR5085012), pp. 8-9.

**HIGHLY CONFIDENTIAL  
SUBJECT TO PROTECTIVE ORDER**

product occurred in April 2003 with the launch of Windows Server 2003.<sup>171</sup> The earliest point at which Burst alleges that Microsoft may have developed Fast Start and Fast Cache, and used the features internally, was December 2001, when Microsoft first announced Windows Media 9 and Fast Stream technology.<sup>172</sup> Thus, I have considered the outcome of a hypothetical negotiation taking place in the December 2001 to April 2003 time-period. Within this time-period, the specific date of the hypothetical negotiation would not be expected to have a significant impact on its outcome.

I have used a three-step process to estimate the reasonable royalty or license fee that would be the likely outcome of such a negotiation. First, I determined the form that the royalty resulting from the hypothetical negotiation would take. Second, I estimated the appropriate range over which the negotiations would take place based upon the minimum that the licensor would be willing to accept and the maximum that the licensee would be willing to pay. Third, I undertook an analysis of the *Georgia-Pacific* factors, which are widely used by courts in determining reasonable royalties in patent infringement litigation.<sup>173</sup> Application of the *Georgia-Pacific* factors facilitates a determination of the appropriate reasonable royalty from among a range of possibilities.

#### B. Form of Royalty

The outcome of a hypothetical negotiation between Burst and Microsoft over a non-exclusive license to the patents-in-suit most likely would have resulted in a lump-sum payment. Such a form of payment is the one considered both by Burst and Microsoft during their actual negotiations. Further, a lump-sum payment is consistent

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<sup>171</sup> Press Release, "Microsoft Windows Server 2003 Is Available Worldwide Today," April 24, 2003. Available at <http://www.microsoft.com/presspass/press/2003/apr03/04-24WindowsServer2003LaunchPR.asp> <viewed January 28, 2005>.

<sup>172</sup> At the time of the December 2001 announcement, Windows Media 9 was referred to as "Corona." See, "Microsoft Previews the Next Version of Windows Media Technologies, Code-Named 'Corona,'" available at <http://www.microsoft.com/presspass/press/2001/dec01/12-11CoronaPreviewPR.asp> <viewed January 3, 2005>.

<sup>173</sup> *Georgia-Pacific v. United States Plywood Corp.*, 318 F. Supp. 1116, 1120-21 (S.D.N.Y. 1970), modified and aff'd, 446 F.2d 295 (2d Cir. 1971).

# **EXHIBIT 51**

---

**From:** Will Poole  
**Sent:** Tuesday, February 13, 2001 10:50 AM  
**To:** Kurt Buecheler; Mike Beckerman; Tony Bawcutt; Erik Huggers; Tom Gershaw; David Misakian  
**Cc:** John Weresh (LCA); Bill Schiefelbein; Bret O'Rourke  
**Subject:** RE: Burst redux

I suggest we tell them that we intend to include similar functionality in the platform over time (some potentially as early as WMT9); that if they purchase burst we'd be happy to negotiate an inexpensive one-time buyout license to technology and patents so that we can incorporate it in future platforms. They would get the TTM benefit of using current burst implementations plus long term alignment (but not necessarily compatibility) between current burst technology and our future platform.

-----Original Message-----

**From:** Kurt Buecheler  
**Sent:** Tuesday, February 13, 2001 10:43 AM  
**To:** Mike Beckerman; Tony Bawcutt; Erik Huggers; Tom Gershaw; David Misakian  
**Cc:** John Weresh (LCA); Bill Schiefelbein; Bret O'Rourke; Will Poole  
**Subject:** RE: Burst redux

Burst acquisition interest growing  
 Kurtb

Hi Kurt,

Thanks for the quick reply.

In a nutshell, our European subsidiary, UPC/Chello has a significant interest in adopting the Burst.com technology to their backbone system across Europe, due to the potential OPEX reduction the Burst technology may be able to achieve regarding bandwidth expense, and the superior streaming elements of the Burst technology would generally benefit our interactive services significantly.

From our viewpoint, the Burst company operation appears to be on life-support. We are potentially interested in acquiring Burst if that plan makes economic sense for us, and the plan doesn't put us cross-ways with Microsoft in any way, given Microsoft's equity interest in UnitedGlobalCom, Inc.

It has been represented to us that Microsoft would support a general plan for United to acquire Burst, assuming no cross-purposes develop, in an effort to also be diligent about the Burst technology being acquired by other third parties, in an alternative strategy that I don't want to detail in this forum.  
 In our proposed conference call, we'd like to speak with you about Microsoft's position on this issue, as well as your opinion of software licensing revenue projections to Microsoft or other parties, if United were to acquire Burst.

I'm hesitant to detail anything else in this email, but these are the main issues. Could you give me some idea of your availability to participate in a conference call with myself and our President, Mike Fries, ASAP?

Thanks,

Doug Stewart  
 UnitedGlobalCom, Inc.  
 Denver  
 303.770.4001 Office Phone

-----Original Message-----

**From:** Mike Beckerman  
**Sent:** Thursday, February 08, 2001 9:06 AM

**To:** Tony Bawcutt; Kurt Buecheler  
**Cc:** John Weresh (LCA); Bill Schiebelbein; Bret O'Rourke; Will Poole  
**Subject:** RE: Burst redux

Sure.

-----Original Message-----

**From:** Tony Bawcutt  
**Sent:** Thursday, February 08, 2001 8:17 AM  
**To:** Mike Beckerman; Kurt Buecheler  
**Cc:** John Weresh (LCA); Bill Schiebelbein; Bret O'Rourke; Will Poole  
**Subject:** RE: Burst redux

I just got off the phone with Doug where I delivered the message that we would not be pursuing them further, and that the only opportunity that made sense to us was to get a license to specific patents as an insurance policy, and that the cost for that would have to be well under \$1Mill.

He advised that there was a company, apparently friendly to us, that was interested in acquiring some or all of the company and there would be an announcement on Monday. Clearly their stock has been on the rise, now trading at \$0.84, which raises their capex to \$20M.

He went on further to say that UPC the cable company in UK, is very enamoured with their technology, but has not wherewithall to develop the technology. Not clear whether he was talking about the same company as above, or whether this was an alternate deal. So he intimated that they may be interested in owning the technology, and then working out some license for us to use. I left the door open for details of that deal to come forward, but was clear that it was not just a cash problem to us; we would need to see the value equation.

He is going to get back in the next few days. I will be in Mexico for two weeks starting Sunday. I would like him to be able to talk to either KurtB or MikeBeck. You guys OK with me giving you as contacts?

-----Original Message-----

**From:** John Weresh (LCA)  
**Sent:** Wednesday, January 31, 2001 9:05 AM  
**To:** Bill Schiebelbein; Mike Beckerman; Tony Bawcutt; Bret O'Rourke; Will Poole  
**Cc:** Kurt Buecheler  
**Subject:** RE: Burst redux

**Privileged**

-----Original Message-----

**From:** Bill Schiebelbein  
**Sent:** Tuesday, January 30, 2001 11:44 PM  
**To:** Mike Beckerman; Tony Bawcutt; John Weresh (LCA); Bret O'Rourke; Will Poole  
**Cc:** Kurt Buecheler  
**Subject:** RE: Burst redux

**Privileged**

-----Original Message-----

**From:** Mike Beckerman  
**Sent:** Tuesday, January 30, 2001 6:37 PM  
**To:** Tony Bawcutt; Bill Schiebelbein; John Weresh (LCA); Bret O'Rourke; Will Poole  
**Cc:** Kurt Buecheler  
**Subject:** RE: Burst redux

ATTORNEY / CLIENT PRIVILEGED COMMUNICATION

**Privileged**

**Privileged****-----Original Message-----**

**From:** Tony Bawcutt  
**Sent:** Tuesday, January 30, 2001 5:37 PM  
**To:** Mike Beckerman; Bill Schiefelbein; John Weresh (LCA); Bret O'Rourke; Will Poole  
**Cc:** Kurt Buecheler  
**Subject:** Burst redux

I had a call with Doug Glen and Chuck Cortwright this evening. They claim to have a buyer lined up and will be entering into a no-shop period, which will involve a technical trial, presumably leading to acquisition. But they still wanted to give us an opportunity to participate. They positioned this suitor as not friendly (by later characterizing UPC as friendly).

Doug offered that we might still be able to get a non-exclusive license to the patents we cared about (and which frankly equates to any and all the patents since they ascribe the same value) for something in the order of \$1M per year for a multi year deal (say 3 to 5 years). They said they want more for the total portfolio and more if we use their actual technology/algorithms. We could extend the term, or we could propose a net present value for a one-time buyout.

They then asked why we would do that, and forego the revenue opportunity while also allowing others access to the differentiation (through also licensing or acquiring).

They discussed the option of an asset sale or the outright purchase of the company, which is the same dollar value to them, just give us as the acquirer options in how to dispose of the bones. Stock swap is a further option.

When I asked him what price he was considering, he went into a long diatribe about how the investors were all in at \$3+ range but would probably be OK with \$1.75 per share. When I pointed out that that would be \$35M plus debt (based on 20Mill shares) they seemed almost to be surprised; and when I said that was grossly above where we had previously talked where they shares have hovered in the \$0.50 range, meaning they have been in the \$10-\$12M range (as low as \$6M since we have talked, \$11M today <http://moneycentral.msn.com/scripts/webquote.dll?iPage=qd&Symbol=BRST>) plus the debt and "value overhang" putting previous number in the \$15M range. Maybe they have always been thinking higher but that is where I have always interpreted them to be.

Note on the capitalization of the company: their share volume is 50K shares traded today on 20Million outstanding, which means virtually no volume. When that capitalization enters the discussion, you have to ask "value to who". If there is not acquirer, it is difficult to see this company sustaining any value as they run out their cash reserves. It has no value to new, small-stake shareholders, since there is no business model left. So the current market cap is a bit of a levitation feat.

So I think they indicated we could get a perpetual non-exclusive license for \$3-5Mill, and could get the whole company for under \$10M + debt, which feels like they have come down by about half.

Final wildcard: they said that they had shopped themselves to UPC (UK cableco) and their CTO felt they could save the cost of the company in annual bandwidth savings. UPC felt acquiring the company was outside of their core competence, but Doug felt that we could maybe triangulate a deal whereby they acquired rights/technology through us and paid the lion's share.

I don't think they would sell for the \$1M we have bandied around, but I think we if we gave negotiators \$5 Million to play with they could come back with effectively the company.

So the questions is as before:

- 

**Privileged**

- what value does the technology have to us in furthering our development, and
- what is the value to (revenue from) others such as UPC (@Home had also noted interest in other discussions) in form of sub-license or products.

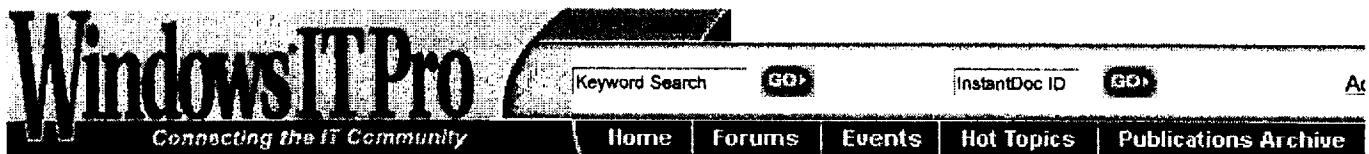
I promised them 24 hour turnaround on an answer, and I think this needs to be go/no go.

History chart here; :

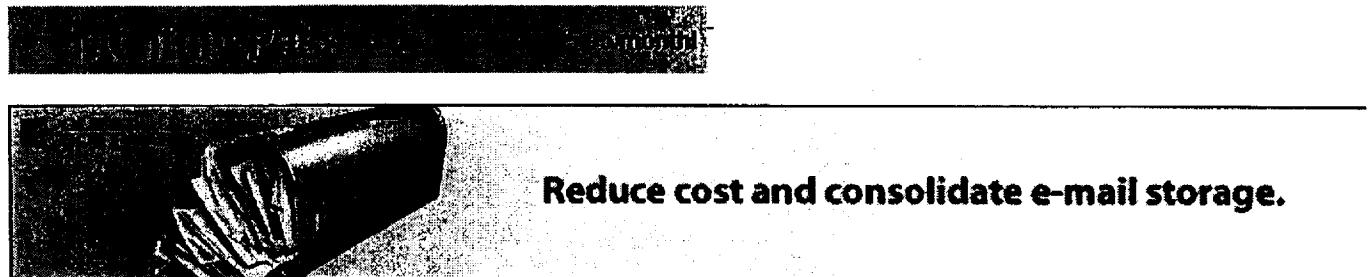
<http://moneycentral.msn.com/investor/charts/chart1.asp?Symbol=BRST&DateRangeForm=1&CP=0&PT=5&C5=1&C6=&C7=1&C8=&C9=0&ComparisonsForm=1&CE=0&DisplayForm=1&D9=1&D0=1&D4=1&D7=&D6=&D3=0&ShowChtB1.x=45&ShowChtB1.y=10>

Tony Bawcutt  
Group Manager Business Development  
Digital Media Division, Microsoft  
425-936-7611

# **EXHIBIT 56**



Related Hot Topics: [Exchange & Outlook](#) | [Storage](#)



[Feature]

## Control Mailbox Size with Mailbox Manager

Tony Redmond  
InstantDoc #6253  
November 1999

Most email users are pack rats: They keep as much mail and other items as you'll let them stuff into their Exchange Server mailbox. Because many large Exchange Server implementations allocate each mailbox 50MB by default—mailboxes that hold 1GB or more are not unknown—you can see how the private Information Store (IS) can easily grow to 60GB or larger. Such large databases have extremely long backup times and make getting the server back online quickly after hardware failures a difficult task. A large email repository also worries legal departments around the world because of the information that investigators might find in the messages. The best example of incriminating messages, of course, is the role of email in Microsoft's battle with the US Department of Justice.

You can exert control over the size of the private IS by imposing mailbox quotas. You can also control mailbox size by encouraging users to regularly clean up their mailboxes. Enterprise-style messaging systems have long incorporated tools to help administrators manage mailbox contents. For example, ALL-IN-1, Digital Equipment's office system that dominated email for most of the 1980s and early 1990s, had the Janitor, a background process that deleted any messages older than a set number of days.

In Exchange Server 5.5 Service Pack 3 (SP3) Microsoft has finally introduced an effective email-management tool—Mailbox Manager. Although the utility comes with an Exchange Server 5.5 service pack, you can run it on any Exchange Server 5.0 or 5.5 server. Let's look at how Mailbox Manager evolved and how you install, configure, and use the utility to keep mailbox size manageable.

### **Earlier Products**

Microsoft made some earlier attempts to help you control mailbox size, but those tools have been inadequate. The Microsoft Exchange Administrator program's Clean Mailbox option lets you select a group of mailboxes and examine and clean their contents according to set criteria. You can select anything from one mailbox to every mailbox on a server. However, this utility is limited because it performs the process in the foreground; you can't schedule it to occur automatically. And although processing one user's mailbox this way is feasible, selecting and processing all the mailboxes on a large server isn't practical.

An improved utility, Mailbox Cleanup Agent, appeared in the *Microsoft BackOffice Resource Kit (BORK)*. Early releases had many bugs, and even the less buggy later versions had nagging problems such as lack of support for the Alpha platform. Another problem with the agent was that some installations refuse to put any *BORK* utility into production because *BORK* tools aren't part of the Exchange product and administrators fear that Microsoft won't support the tools. If you use the Mailbox Cleanup Agent correctly, however, it works fine.

### Installing Mailbox Manager

Mailbox Manager's documentation is an HTML file. Although Mailbox Manager is included with Exchange Server 5.5 SP3, the service pack doesn't automatically install the program because the program can run on any Exchange Server 5.0 or 5.5 server. However, because of a memory leak that Mailbox Manager exposes, Microsoft recommends that you run the program only on servers running Exchange Server 5.5 SP2 or later. You can run Mailbox Manager on one server within a site and have the utility process mailboxes on all the site's servers, so you don't have to upgrade every server to SP2. Running a program to process mailboxes on remote servers can generate a lot of network traffic, so you need to make a trade-off. I recommend that everyone upgrade to Exchange Server 5.5 because it's the best version of the software to date.

Mailbox Manager replaces *BORK*'s Mailbox Cleanup Agent; the two programs can't coexist on the same server, so remove the Mailbox Cleanup Agent before installing Mailbox Manager. The installation kit for Mailbox Manager is in the `\ENG\SERVER\SUPPORT\MBMNGR\SETUP\<hardware-platform>` directory on the Exchange Server 5.5 SP3 CD-ROM. You can also download the kit (20MB) as part of the SP3\_55 SS Server support files at <http://www.microsoft.com/exchange/DeployAdmin/sp3.htm>. Installation is quick and easy. The installation prompts you for an account to run Mailbox Manager service under (the default is to use the Exchange Service account) and a disk location for the temporary files created during processing. After the installation is complete, you must specify policies for Mailbox Manager to enforce before you can set a schedule and start cleaning up your server.

### Setting Policies

Microsoft describes Mailbox Manager as a tool that helps enforce corporate message-retention policies. Every company is different and must factor its message-retention policy into the broader landscape of document and knowledge management. The message journaling feature that Exchange Server 5.5 SP2 introduced is another example of a document management extension for Exchange. You need to balance the need to protect confidential messages against the need to preserve important information.

As Screen 1 shows, Mailbox Manager installs into the site's Configuration container. Double-clicking the add-in lets you amend its properties that cumulatively form the message retention policy for Mailbox Manager to obey.

The General Properties page, which you see in Screen 2, contains several important options. First, you must specify the mailbox you want to receive administration reports. Second, you must decide whether you want the program to clean mailboxes or run in audit mode. Audit mode means that the program scans mailboxes to identify items that the program would delete according to the retention policy but the program doesn't take any action. Instead, the program provides a report that shows how effective the policy will be if you put it into effect.

The third important choice is where to move messages that the program deletes. The cleanest approach is to delete messages immediately, but use that option only when you're sure that users understand that the program will permanently delete messages from their mailboxes after a set period. On Exchange Server 5.5 servers, you can always recover deleted messages if you set the deleted-items retention period to more than zero days. The other options are to move items into the standard Deleted Items folder or into a special set of folders in each user's mailbox under a root called System Cleanup (e.g., move items from the Inbox to an Inbox folder under the

System Cleanup root). In most cases, the best choice is to simply move items into the Deleted Items folder because users expect to find deleted items there. However, remember that Outlook lets users choose to empty the Deleted Items folder each time they exit; therefore, if Mailbox Manager moves items to the Deleted Items folder, the program might empty the folder before users realize that Mailbox Manager has cleaned their mailbox.

As Screen 3 shows, Mailbox Manager lets you set general policies and per-container policies. General policies include details of the message classes that the program processes and lifetime limits of large items. You can, for example, define a policy to remove all items larger than 5MB that are more than 60 days old. Message classes include IPM.Note (the standard class used for email), IPM.Contact, IPM.Task, and IPM.Appointment. You can choose to process all or none of these classes, and you can incorporate message classes that special applications use.

In most cases, you want to exclude IPM.Contact, IPM.Task, and IPM.Appointment from processing for two reasons. First, these items take up a small proportion of the overall store. Second, users tend to like to keep contacts, tasks, and calendar items until they're ready to remove them. Typically, contacts have a much longer lifetime than messages because users explicitly create contacts so that they can send email to external correspondents.

Screen 4 shows how you can exclude specific mailboxes from processing. Mailbox Manager skips excluded mailboxes when it reads through a recipient container.

### **Running Mailbox Manager**

On the Schedule tab, you specify when to run Mailbox Manager. As Screen 5 shows, you can run the program immediately by clicking Clean Now. This option first checks whether the Mailbox Manager service (i.e., Microsoft Exchange Server Mailbox Manager) is running and whether Exchange Administrator has committed any policy changes to the Exchange Directory Store. You must commit policy details by clicking Apply on each property page. If the service isn't running, you can start it. The service stays running until you shut down the system or stop the service manually.

The Mailbox Manager service runs as a process called mbclean.exe, which doesn't consume many system resources because it waits until a scheduled run comes due and then starts to issue instructions to the IS process (store.exe). Store.exe takes the brunt of the work necessary to navigate through the recipient containers and scan items. During my tests, store.exe peaked at over 50 percent of the CPU and took some extra memory from the system. Dynamic buffer allocation (DBA), a feature Microsoft introduced in Exchange Server 5.5, lets the IS request more memory from Windows NT whenever the IS needs it and return memory to NT when other programs need it. You appreciate the value of DBA's automatic tuning when programs such as Mailbox Manager generate additional load. Finally, Mailbox Manager creates a set of transaction logs at rapid intervals. You expect this behavior because the utility needs to access many folders and items in user mailboxes to decide whether they meet the criteria for deletion. If the utility processes items, it creates transactions that Exchange must log. Because Mailbox Manager generates substantial overhead, schedule it for late at night when the system load is lightest. The utility might take up to 12 hours to process the IS on servers that support thousands of mailboxes or whose priv.edb is larger than 20GB.

### **Reporting**

Mailbox Manager includes several reporting facilities to inform you about the tasks the program has performed. The utility logs error and informational messages as events in the application event log. These events report when Mailbox Manager begins and completes processing and when the utility encounters errors during a run. It also reports a 1016 event for each mailbox that it processes, which signifies that an account that isn't the primary NT account for the mailbox (i.e., the account that runs mbclean.exe—usually the Exchange site services account) has logged onto the mailbox. Some installations monitor the event log for event 1016 to detect unauthorized

attempts to access mailboxes, so expect to see a lot of events logged.

Users receive a message containing details of the work Mailbox Manager has performed in their mailbox. The message informs the user that Mailbox Manager has removed some messages and explains where the deleted messages are. As Screen 6 shows, you can customize some of the message text. You can tell users to call the Help desk if they need assistance to retrieve deleted messages or explain that Mailbox Manager is a scheduled, automatic process. Mailbox Manager processes only server-based mailboxes, so if you want to hide messages from this type of processing, create a personal folders (.pst) file and move the messages there. PSTs are purely personal, and no server-based utility, including system backups, ever processes their contents.

The assigned administrator receives summary information about everything Mailbox Manager has done. This report comes as a text message that contains a brief summary with an attached Comma Separated Values (CSV) file that includes detailed information you can use for analysis and reporting. You can open CSV files with Notepad, but using a program such as Microsoft Excel or Access is easier and more functional. Screen 7 shows an Excel spreadsheet containing Mailbox Manager data edited to remove some columns and make the column headings more understandable. You can write a macro to edit the information every time you receive a report. Screen 7 shows typical data (note that the utility shows no data for mailboxes that it skips) and summary information at the end.

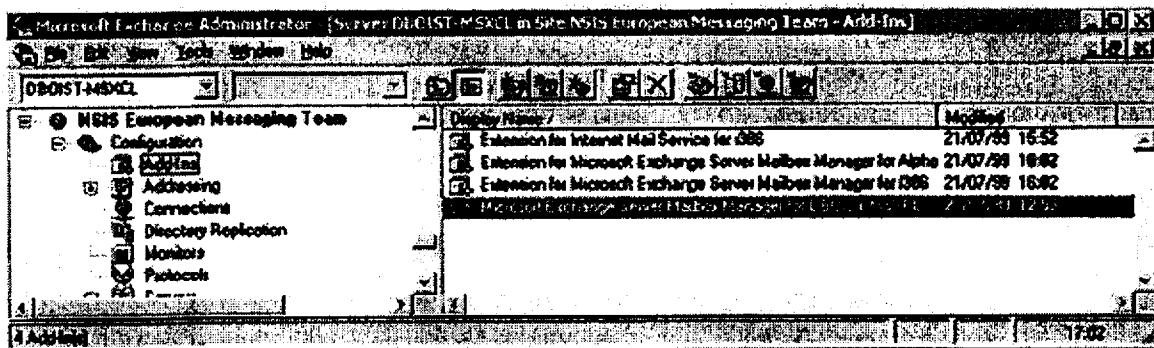
## Going Forward

Mailbox Manager is such a useful tool that you might wonder why Microsoft took so long to incorporate it into Exchange. All enterprise-level messaging systems need this functionality to help administrators rein in the insatiable demands for more mailbox quota.

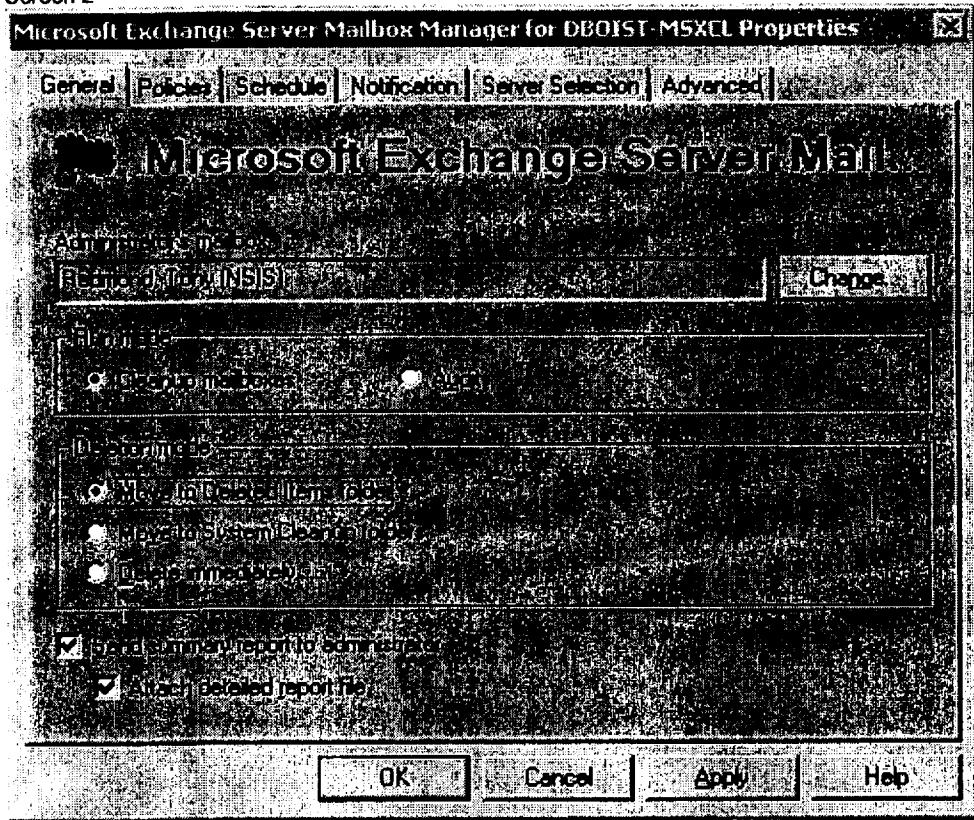
Implementing tools such as Mailbox Manager is easier when an Exchange user community is new, especially if the company has migrated from another email system with similar functionality. Implementing Mailbox Manager for experienced users who have had years to build up a lot of rubbish is more difficult.

For older servers, you can use Mailbox Manager to gradually clean up and remove older items according to a well-publicized schedule (e.g., first you'll remove items 2 years old, then items 1 year old, later those 6 months old). When you've removed the older items, you can implement a long-term cleanup schedule to maintain the mailboxes. For new servers, you need to put the procedure in place from day one.

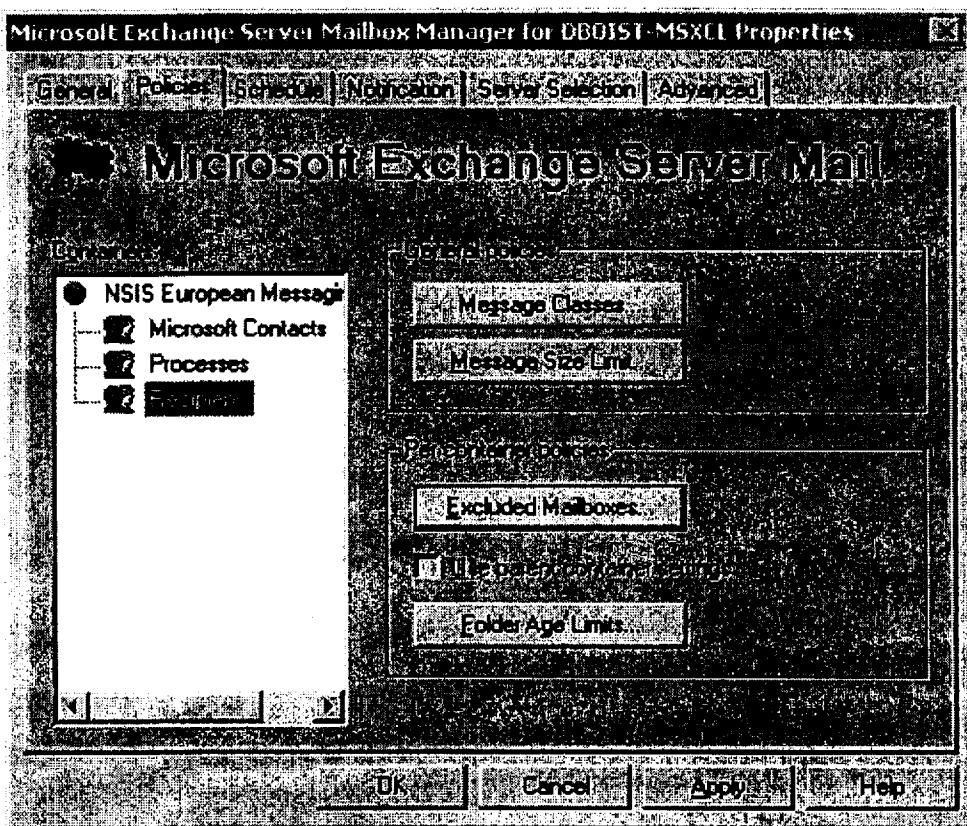
Screen 1



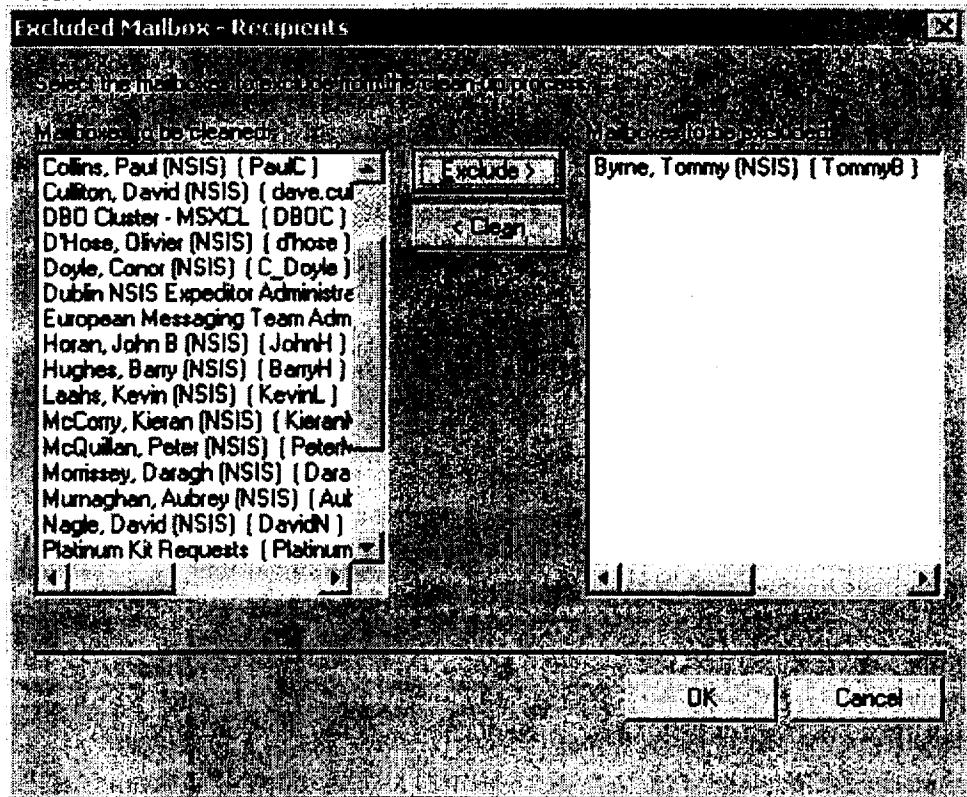
Screen 2



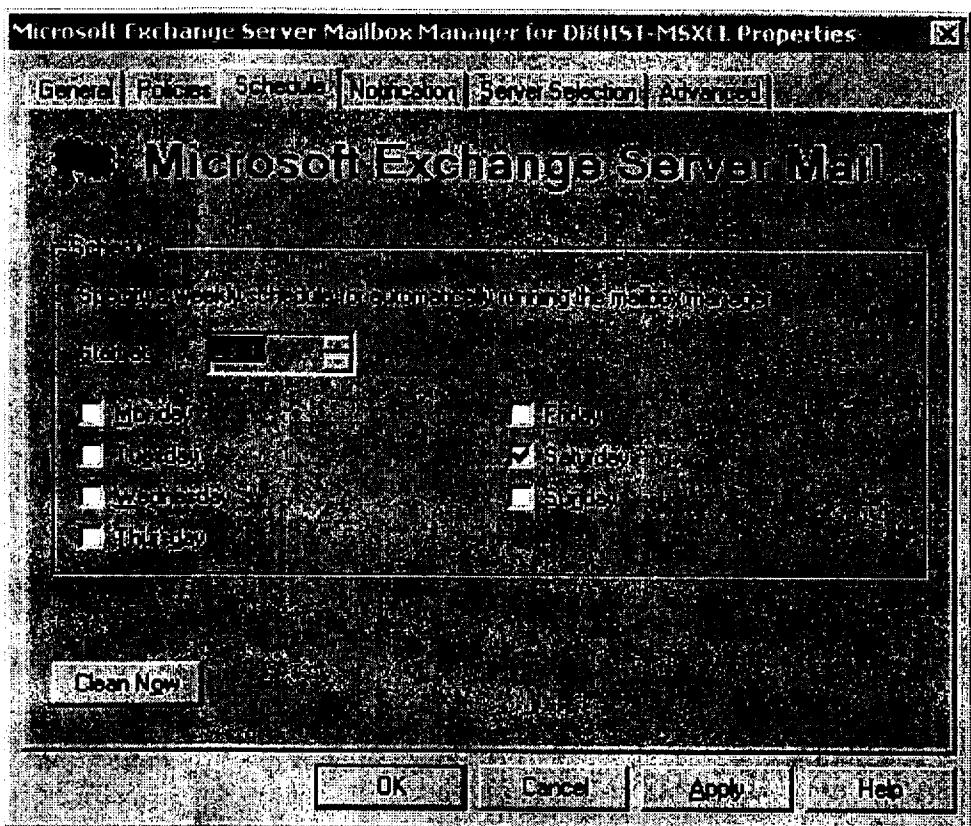
Screen 3



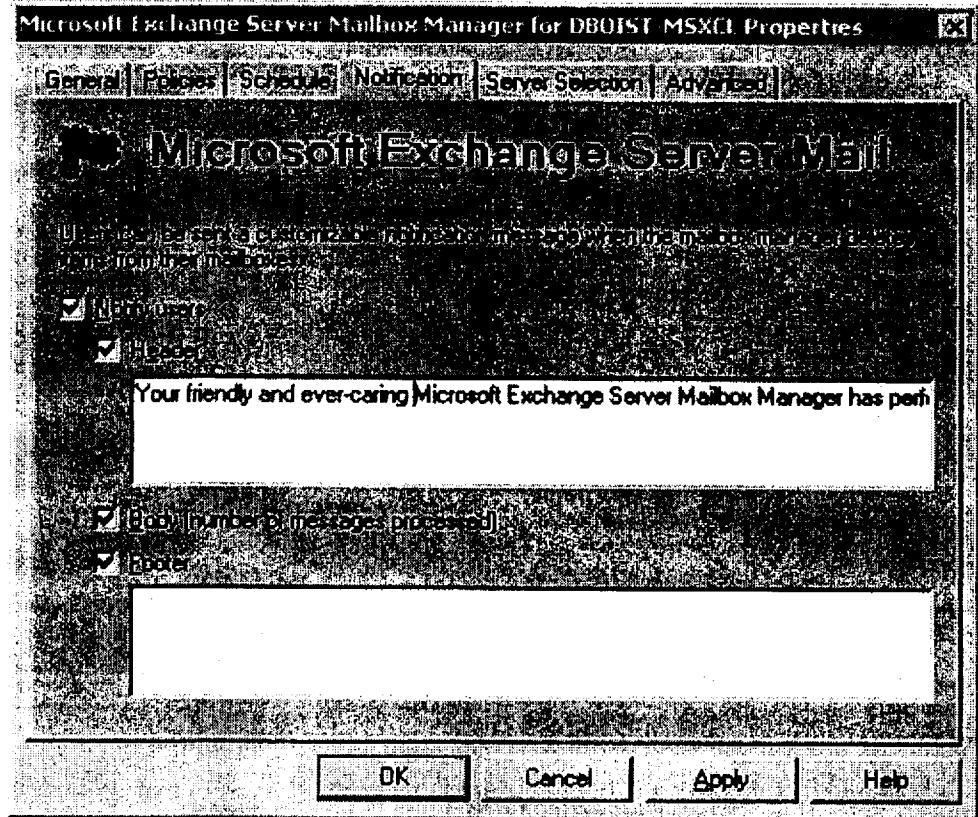
Screen 4



Screen 5



Screen 6



Screen 7

			Mailboxes processed	Messages in mailbox	Size of messages at start	Number of messages deleted	Size of messages deleted	Size of messages moved	Size of messages moved
1	Date	Time	Display Name						
2	07/26/99	12:53:41	DBOST-MSXCL						
3	07/26/99	12:53:56	Baxter, Pat (MSIS)						
4	07/26/99	12:53:56	Burgess, Ian (MSIS)						
5	07/26/99	12:53:56	Byrne, Tommy (MSIS)						
6	07/26/99	12:53:56	Cleary, Padraig (MSIS)						
7	07/26/99	12:54:33	Collins, Paul (MSIS)		2,686	61,626	73	66	196
8	07/26/99	13:01:18	Culliton, David (MSIS)		6,933	226,990	0	0	2,376
9	07/26/99	13:01:18	DBO Cluster - MSXCL		6,942	236,147	9	7,261	0
10	07/26/99	13:01:20	Dulien NSIS Expeditor Administration Agent		6,961	237,766	8	1,439	2
11	07/26/99	13:01:47	European Messaging Team Administration		10,190	319,591	46	1,202	216
12	07/26/99	13:02:00	Purcell, Eric (MSIS)		12,162	368,374	0	0	1
13	07/26/99	13:02:00	Rafferty, Bill (MSIS)						
14	07/26/99	13:02:00	Ridderinkhof, Jerry (MSIS)						
15	07/26/99	13:02:00	Rhettan, John (MSIS)						
16	07/26/99	13:02:00	Ricketby, Gordon (MSIS)						
17	07/26/99	13:02:00	Vanasse, Val-Math (MSIS)						
18	07/26/99	13:02:00	Recipients		8		136	9,960	2,796
19	07/26/99	13:02:00	DBOST-MSXCL		8	12,152	368,374	135	9,960
20	07/26/99	13:02:00	DBOST-MSXCL				136	9,960	2,796
21	07/26/99	13:02:00	DBOST-MSXCL						132,206
22									

## Reader Comments

I use Mailbox Manager to control the age of messages on Exchange 5.5, but how can I control messages on .PST files on individual PCs? Is there a tool to use in the enterprise?

Jay Miller -May 07, 2003

Is this feature is free or not. how can we down load this mail box. Can we use it with hotmail?

Abdul Mateen -April 29, 2004

Can Mailbox Manager differentiate between READ and UNREAD emails? We only want to delete READ emails. Is there an add-on for Exchange 5.5 that can facilitate this exception?

hatchparent -July 28, 2004

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